



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**ANGELA VASSALLO,**

Complainant,

v.

**HEAD INJURY ASSOCIATION,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10188923

Federal Charge No. 16GB703461

**PLEASE TAKE NOTICE** that the attached is a true copy of the Alternative Proposed Order, issued on August 30, 2019, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before 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 Alternative Proposed Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE ANGELA FERNANDEZ, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:**

- The Alternative Proposed Order (“APO”) is adopted in its entirety with the

following three amendments -- the first, including a grant of \$16,550 in attorney's fees for Complainant's counsel, the second addressing Respondent's objections related to Complainant's mitigation of her back wages and the third related to Respondent's objections to the mental anguish damage award:

- Attorney's Fees

On September 7, 2018, Complainant's counsel made an application for attorney's fees and renewed the request on September 19, 2019. By letter dated October 3, 2019, Respondent's counsel requested an opportunity to respond which was granted along with an opportunity for Complainant's counsel to reply to the response. All submissions have been considered.

At the time this Complaint was filed, attorney's fees were available only in cases involving housing, housing credit and in employment and employment credit cases where sex was the basis of discrimination. *See* Human Rights Law § 297.10 (amended Oct 11, 2019). When interpreting the Human Rights Law, the courts have consistently held that distinctions based solely upon a woman's pregnant condition constitute sexual discrimination. *See Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y.2d 211, 216 (1993) (citing *Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights*, 77 N.Y.2d 12, 17 (1990) ("singling out pregnancy for different treatment from other physical or medical disabilities discriminates on the basis of sex and is prohibited in areas addressed by the Human Rights Law"); *Brooklyn Union Gas Co. v. State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 86 (1976) ("an employment personnel policy which singles out pregnancy and childbirth for treatment different from that accorded other instances of physical or medical

impairment or disability is prohibited by the Human Rights Law”); *Newport News Shipbuilding & Dry Dock v. Equal Empl. Opportunity Comm’n.*, 462 U.S. 669, 684 (1983) (similarly construing title VII [42 USC § 2000e et seq.]) It is axiomatic that only a woman can suffer a pregnancy-related condition. And, although anyone might suffer from hypertension, the risk to Complainant in this case was preeclampsia, a condition only related to pregnancy. Thus, discrimination based on a pregnancy-related condition is also discrimination based on sex and attorney’s fees are available.

Attorney’s fees are calculated utilizing the “lodestar” method. *See McGrath v. Toys “R” Us, Inc.*, 3 N.Y.3d 421, 430 (2004). This method calculates the amount of the fee award “by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.” *Id.* at 427.

#### Number of Hours

In determining the number of hours reasonably expended,

(1) hours which reflect inefficiency or duplication of services should be discounted; (2) hours that are excessive, unnecessary or which reflect ‘padding’ should be disallowed; (3) legal work should be differentiated from nonlegal work such as investigation, clerical work, the compilation of facts and other types of work which can be accomplished by nonlawyers who command lesser rates; (4) time spent in court should be differentiated from time expended for out-of-court services; and (5) the hours claimed should be weighed against the court’s own knowledge, experience and expertise as to the time required to complete similar activities.

*McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc.2d 325, 328 (N.Y. Sup. Ct. 1997) (citing *Rahmey v. Blum*, 95 A.D.2d 294 (2d Dept. 1983)).

Complainant’s counsel submitted contemporaneous time records recording 84.7 hours of work on the case. Of that time, there is no differentiation of legal work from nonlegal work. *See* Complainant’s September 19, 2019, fee request.

The hearing lasted five hours and nine minutes, from 9:30am until 2:39pm. (Tr. 1, 162). Counsel billed six hours for each attorney to appear. *See* September 19, 2019, fee request, Exhibit A at p. 26. The issues raised in the Complaint and the evidence produced at the one-day hearing did not require the presence of two attorneys. Accordingly, of the 12 hours billed for the hearing, 5.2 hours will be compensated and 6.8 hours will be disallowed. *See Luciano v. Olsted Corp.*, 109 F.3d 111, 117 (2d Cir. 1997) (“[in] court’s discretion to determine whether or not the actual time expended by an additional attorney was reasonable”).

Of the remaining 72.7 hours of billed time, many of the entries were too vague to determine the nature of the work performed. For instance, many of the entries merely describe text messages regarding the case status or phone calls with the client with no explanation. Other entries are clearly related to nonlegal work such as scheduling matters or basic correspondence. “Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.” *Rahmey v. Blum*, 95 A.D.2d 294 (2d Dept. 1983) (citations omitted). Accordingly, 14.3 hours will be compensated at the paralegal rate. The remaining 58.4 of the billable hours have sufficient descriptors to allow at the attorney rate. This includes time billed for phone calls that have no description but from the length of the calls it can be concluded the conversations were substantive. Counsel is nonetheless encouraged to include descriptions in future fee requests.

#### Hourly Rate

A reasonable attorney’s fee “should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable

reputation to those by whom the prevailing party was represented. Thus, the hourly rate charged by an attorney will normally reflect the training, background, experience and skill of the individual attorney.” *McIntyre*, 176 Misc.2d at 328 (citations omitted).

In the instant matter, Complainant’s counsel consists of two attorneys, Christopher J. Berlingieri, Esq., the named principal of the firm, and Melissa Alexis Rodriguez, Esq., a firm partner. Both attorneys are claiming a rate of \$350 per hour. Both attorneys have been practicing since 2015 with a primary focus on labor and employment matters. Other than a statement that counsel determined their rate is reasonable “after consulting with other attorneys in the field,” the only other evidence of the reasonableness of the rate claimed is an affirmation from another attorney, also practicing since 2015, stating as much. *See* September 19, 2019, fee request letter. They submitted no evidence of rates approved by courts in the Eastern District or Second Department. *See Orser v. Wholesale Fuel Dist.-CT, LLC*, 65 Misc.3d 449, 456 (N.Y. Sup. Ct. 2018) (“while plaintiff submitted affidavits from respected disinterested counsel attesting to current market rates, the record is bereft of any evidence that other courts in the Northern District (or the Third Department) have specifically approved the higher rates sought by plaintiff’s firm in similar labor law litigation”).

In a recent Division case confirmed by the Appellate Division, an attorney with twenty-nine years of experience, though his experience litigating civil rights cases was not in evidence, had his fee rate request reduced to \$300 per hour. Citing to *Hugee v. Kimso Apartments, LLC*, 852 F.Supp.2d 281 (E.D.N.Y. 2012), the

Commissioner noted that “courts in the Eastern District of New York ‘have determined that reasonable hourly rates in this district are approximately \$300-\$450 per hour for partners, \$200-\$300 per hour for senior associates, and \$100-\$200 per hour for junior associates.’ The highest rates are reserved for experienced civil rights attorneys practicing in the district.” *Hough v. Toms Point Lane Corp.*, Div. Case No. 10173211 (June 24, 2016), confirmed by *1 Toms Point Lane Corp. v. State Div. of Human Rights*, 176 A.D.3d 930 (2d Dept. 2019). In *Flores v. Big Six Towers, Inc.*, Div. Case No. 10186900 (Sept. 27, 2019), attorneys with similar years of experience to counsel here were allowed \$250 per hour in a matter which arose in the Second Department and Eastern District, though it appears the ALJ looked to the Southern District to determine the prevailing fee.

A review of recent fee awards in the Eastern District of New York show rates for partners ranging from \$200 to \$450, with higher rates for partners with more than fifteen years of experience. See *Equal Employment Opportunity Comm'n v. United Health Programs of Am., Inc.*, 350 F. Supp. 3d 199, 233-34 (E.D.N.Y. 2018) (collecting cases) (reduced \$475 per hour fee request to \$400 per hour, noting that the \$400 fee “on the higher end of the fee scale” was appropriate for named partner with twenty-four years of experience, but also considering that the firm was small with only two named partners).

In *Francis v. Atl. Infiniti, Ltd.*, 2012 WL 398769 (N.Y. Sup. Ct. 2012), the New York State Supreme Court reviewed Eastern District fee awards and concluded “that the hourly rate of \$300.00 per hour is reasonable for the Queens County community for an experienced attorney of 10 to 15 years; \$250.00 per hour for 5 to 10 years;

\$225.00 per hour for 5 or less years and \$85.00 per hour for a paralegal.”

Therefore, a rate of \$225 per hour is appropriate as both of Complainant’s attorneys have fewer than five years of experience and are the only two attorneys with their firm. Though they assert in the fee request that each has litigated and/or appeared in court extensively, no information was submitted detailing the nature of those appearances or the litigation or the level of their success in those matters. The nonlegal work will be allowed at \$85 per hour.

#### The Lodestar

Accordingly, 5.2 plus 58.4 hours of legal work at \$225 per hour results in a fee of \$14,310. The remaining 14.3 hours of nonlegal work at a rate of \$85 per hour results in a fee of \$1,216. There being no reason to reduce or increase the lodestar amount, the total amount is \$15,526.

#### Expenses and Costs

Counsel’s fee application contains a request of \$1,024 for out-of-pocket expenses. “Prevailing parties are also entitled to recover reasonable, identifiable out-of-pocket disbursements which are ordinarily charged to clients.” *Francis v. Atl. Infiniti, Ltd.*, 2012 WL 398769 at \*9 (citations omitted). These expenses are properly identified and reasonable. Thus, Complainant’s counsel is entitled to a total attorney’s fee award in the amount of \$16,550.

Therefore, in addition to the other payments required herein, within sixty days of the date of this Order, Respondent shall pay to Complainant’s attorneys \$16,550 in fees in the form of a certified check made payable to Berlingieri Law, PLLC and delivered by certified mail, return receipt requested, to Christopher J. Berlingieri,

Esq., Berlingieri Law, PLLC, 244 Fifth Ave, Ste F276, New York, NY 10001.

Interest shall accrue on the award at a rate of nine percent per year, from the date of this Order until payment is actually made by Respondent.

- Mitigation

It is Respondent's burden to prove a lack of diligent effort to mitigate damages. *See Walter Motor Truck Co. v. State Human Rights Appeal Bd.*, 72 A.D.2d 635, 636 (3d Dept. 1979). Respondent argues that Complainant failed to mitigate when she "elected not to reapply for her position with the Agency when offered the opportunity to do so." *See* Respondent's September 16, 2019, Objections to the APO at p. 4.

The refusal of an unconditional offer of reinstatement tolls a claim for back pay. *See Bell v. Helmsley*, 2003 WL 1453108 at \*2 (N.Y. Sup. Ct. 2003) (citing *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997); *Robles v. Cox & Co., Inc.*, 154 F.Supp. 795 (S.D.N.Y. 2001)). The burden of proof as to whether an unconditional offer of reinstatement was made is on the respondent. *See Miano v. AC&R Adver., Inc.*, 875 F. Supp. 204, 220 (S.D.N.Y. 1995) (citing *Dominic v. Consol. Edison Co. of N.Y.*, 822 F.2d 1249, 1258 (2d Cir. 1987)).

Here, Respondent has failed in its burden. What is clear from the record is that Respondent was offering Complainant an opportunity to reapply, not an unconditional offer of reinstatement. Respondent offered no evidence other than Schaefer's testimony to support its position that Complainant was guaranteed rehire. Complainant's testimony and the circumstances presented (i.e., Complainant was not rehired but merely provided an opportunity to submit an application) support a conclusion that rehire was not a guarantee. In her June 26, 2017, letter to

Complainant, Schaefer wrote, “Once able [*sic*] to return to work with medical clearance, you are more than welcome to re-apply with Head Injury Association.” *See* Complainant’s Exhibit 4. An offer to reapply is not an unconditional offer of reinstatement. *See Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 879 (11th Cir. 1986) (citing *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614, 625 (6th Cir. 1983) (an interview letter is not an unconditional offer of employment), *cert. denied*, 466 U.S. 950 (1984); *Orzel v. Wauwatosa Fire Dep’t*, 697 F.2d 743, 757 (7th Cir. 1983) (offer of reinstatement conditioned upon plaintiff’s taking and passing a physical exam did not toll back pay liability), *cert. denied*, 464 U.S. 992 (1983)); *see also. Ernst v. Chicago*, 2018 WL 6725866 at \*12-14 (N.D. Ill. 2018) (collecting cases) (“[s]everal cases suggest that offers of reinstatement requiring a candidate to take antecedent steps are, in fact, conditional, and that it is reasonable for plaintiffs to reject such offers.”)

Even if Respondent had been offering to reinstate Complainant, Complainant did not understand it that way. *See* Tr. 57. Thus, her failure to pursue the “offer” was reasonable. *See Miano v. AC&R Advert., Inc.*, 875 F. Supp. at 224-25 (whether a complainant’s rejection of a reinstatement offer was reasonable is measured by whether a reasonable person in her shoes, knowing what she knew at the time, would refuse the offer).

Furthermore, because Respondent’s purported offer would have stripped Complainant of any of her accumulated benefits, return her as a new hire and required her to undergo new hire training, it did not meet the requirement that the offer return her to the same status as she previously occupied. *See Reilly v. Cisneros*, 835 F.

Supp. 96, 99-100 (W.D.N.Y. 1993), *aff'd*, 44 F.3d 140 (2d Cir. 1995) (“position must afford him or her virtually identical promotional opportunities, compensation, job responsibilities, working conditions and *status* as the former position.” (emphasis added) (citations omitted)).

Therefore, Respondent has not met its burden of proving Complainant failed to mitigate her damages. Accordingly, backpay is awarded as detailed in the APO.

- Mental Anguish

In its Objections, Respondent argues that there is no evidence that Complainant’s “termination *caused* any change in her pre-existing condition of chronic hypertension.” (emphasis in original) September 16, 2019, Objections at p. 5. However, Complainant discovered that her employment had been terminated June 26, and a mere two days later, her doctor had to increase her medication because her blood pressure, which had been stabilized, increased. (Tr. 67-68, 96). The next week, Complainant lost the pregnancy. (Tr. 69). Thus, the temporal proximity between Complainant’s finding out about the termination and the rise in her blood pressure suggests that they were related. There is no doubt that Complainant was extremely upset during this period. In fact, when Complainant visited her doctor on June 28, she discussed the termination with him and he advised her to try not to stress about it. (Tr. 68). She testified that she believed there was a link between the termination and her health “[b]ecause I -- my blood pressure was stabilized up until the point I -- I had to face the fact that they fired me and once I realized they fired me, it brought on a lot of worries and confusion and stress ‘cause that was my only source of income.” (Tr. 70).

Respondent cites to *New York City Trans. Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991) in support of its position. In that case, the Court of Appeals reversed the Appellate Division which had reduced a Division award from \$450,000 to \$75,000. On remittal, the Appellate Division confirmed the \$450,000 award. This case was cited by the APO in support of the award here. See *New York City Trans. Auth. v. State Div. of Human Rights*, 181 A.D.2d 891 (2d Dept, 1992). In that case, the Division found that the complainant, who had had a history of miscarriages, requested restricted duty when she became pregnant. The request was ultimately denied and she suffered a miscarriage. Notably, in remitting the matter, the Court of Appeals stated, “The Appellate Division statement that complainant’s feelings of depression after suffering the miscarriage ‘were not unequivocally attributable to [respondent] is a mischaracterization of the Commissioner’s finding that, while there was insufficient proof the Transit Authority’s wrongdoing caused the miscarriage, there was a sufficient link between the Transit Authority’s conduct and complainant’s mental anguish after the miscarriage, persisting to the time of her testimony.” *New York City Transit Auth.*, 78 N.Y.2d at 218. Likewise, here, there is a sufficient link between Respondent’s conduct and Complainant’s mental anguish after miscarriage, persisting to the time of her testimony, over a year after the termination.

The magnitude of the complainants’ suffering in the cases cited by Respondent in its Objections is not comparable to what Complainant suffered here. In the matter of a week, she lost her job and her pregnancy. She was distraught. She became very depressed, sought counseling and continued to suffer through the date of the hearing.

(Tr. 70-71). Schaefer and her mother corroborated her testimony. (Tr. 24, 26, 108-09).

In addition to the cases cited in the APO, the award here is supported by the following cases which each take into account that the complainants' suffering resulted from multiple contributing factors: *Maier v. Alliance Mortgage Banking Corp.*, Div. Case. No 10110840 (Feb. 25, 2010) (\$50,000 for complainant who felt scared, angry and hurt as a result of discrimination. He was financially devastated and his relationship with his family was damaged. He was in psychiatric treatment, in part, due to the discrimination, but also because of other issues), confirmed by *Murphy v. Kirkland*, 88 A.D.3d 795 (2d Dept. 2011); *AMR Servs. Corp. v. State Div. of Human Rights*, 11 A.D.3d 609 (2d Dept. 2004) (award reduced to \$50,000 for complainant who cited the termination as one of the stressors that led to his depression, but factors unrelated to termination were additional stressors); *Greenville Bd. of Fire Comm'rs v. State Div. of Human Rights*, 277 A.D.2d 314 (2d Dept. 2000) (award reduced to \$50,000 for complainant whose physical ailments were related to stress caused by the petitioner's discriminatory practices, but also related to a preexisting condition); *Benjamin v. Consolidated Edison Co. of New York, Inc.*, Div. Case No. 10157991 (Sept. 6, 2016) (\$50,000 awarded where complainant lost his job, fiancé and apartment and wound up homeless. He considered suicide, felt betrayed, suffered low energy and nightmares. He was diagnosed with depression, anxiety and post-traumatic stress disorder. He suffered from anxiety stemming from his childhood, but discrimination exacerbated his condition).

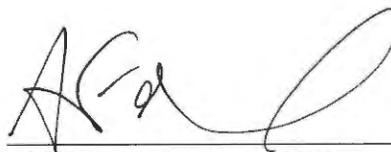
Accordingly, the mental anguish award in the APO is appropriate and is adopted.

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: **FEB 27 2020**  
Bronx, New York

A handwritten signature in black ink, appearing to read 'ANGELA FERNANDEZ', written over a horizontal line.

ANGELA FERNANDEZ  
COMMISSIONER



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**ALTERNATIVE  
PROPOSED ORDER**

Case No. **10188923**

Federal Charge No. 16GB703461

**SUMMARY**

Respondent unlawfully discriminated against Complainant when it denied her a reasonable accommodation for her pregnancy-related condition and terminated her employment. Accordingly, the Complaint is sustained, damages are awarded and a civil fine and penalty is assessed.

**PROCEEDINGS IN THE CASE**

On July 17, 2017, 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 then 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 July 23, 2018.

Complainant and Respondent appeared at the hearing. Complainant was represented by Christopher J. Berlingieri, Esq., and Melissa Alexis Rodriguez, Esq. Respondent was represented by James P. Clark, Esq.

On April 10, 2019, the ALJ issued a recommended Findings of Fact, Opinion and Decision and Order (“Recommended Order”). Both parties filed timely Objections to the Recommended Order with the Commissioner’s Order Preparation Unit.

### **FINDINGS OF FACT**

1. Respondent is a not-for-profit organization which provides services to the developmentally-disabled and to individuals with traumatic brain injuries. It employs approximately 450 employees. (Tr. 102, 104; Respondent’s Ex. 1)
2. On August 16, 2016, Complainant was hired as a day program specialist. (Tr. 33-36, 103-04)
3. In early May 2017, Complainant informed her direct supervisor, Debbie Passaro, that she was pregnant. That same month, Complainant began to suffer from high blood pressure related to her pregnancy. (Tr. 37-40, 78)
4. On Monday, June 19, 2017, after work, during a routine examination, Complainant’s doctor advised Complainant to go to the hospital because her blood pressure was very high and he was concerned about preeclampsia. As a result, Complainant’s life and pregnancy were at risk. Complainant went directly from the doctor’s office to the Southside Hospital emergency room. At around 1 a.m. on June 20th, Complainant was transferred by ambulance to Northshore University Hospital. (Tr. 20-21, 23, 41-44, 53-54; Complainant’s Ex. 2, 3)

5. According to Valerie Schaefer, Respondent's Director of Human Resources, an employee was to notify her manager if she was to be out due to illness. Schaefer was unaware of what an employee was to do if the manager was unavailable. (Tr. 101, 116-19) On June 20th, Passaro was on vacation. (Tr. 46) Schaefer did not know who was handling absence calls for Complainant's group. There is no evidence that she made any attempt to find out. (Tr. 120)

6. Pursuant to Respondent's Employee Handbook, an employee who is out sick must call her supervisor or supervisor-on-call a minimum of one hour prior to the start of the shift. (Respondent's Ex. 1)

7. At 4:30 a.m. on Tuesday, June 20th, pursuant to normal practice when a supervisor is on vacation, Complainant called Najae Jones, another day program manager, and left a voicemail stating that she was unable to work later that day because she was in the hospital. (Tr. 45-47, 56)

8. That night, Complainant left another voicemail with Jones that she was still in the hospital and would be unable to make her shift the next day. (Tr. 47-48)

9. On the 21st, Jones called Complainant's mother, who was Complainant's emergency contact, to inquire about Complainant's status. Complainant's mother confirmed that Complainant was still in the hospital. (Tr. 17-19, 48-49)

10. According to Schaefer, when an employee failed to show up at work and did not call, Respondent's practice was for a manager to call the employee. If they were unable to reach the employee after a few hours, the manager was to contact Human Resources and a Human Resources employee would reach out to the emergency contact. (Tr. 131) There is no evidence this occurred in this case.

11. According to Schaefer, Respondent has no leave without pay unless the employee qualified for leave under the Family Medical Leave Act ("FMLA"). (Tr. 105-06; Respondent's

Ex. 1)

12. Managers were to notify Human Resources when an employee was out and about to exhaust their leave time because the managers were not necessarily aware if the employee qualified for FMLA leave. Schaefer would then make that determination. (Tr. 105-06)

13. On June 21st, Kristen Daniels, a senior manager, notified Schaefer that Complainant was absent and that her accrued leave time had been exhausted. (Tr. 84, 105, 155) There is no evidence as to how Daniels became aware that Complainant was absent, nor as to whether Daniels was aware that Complainant was in the hospital. Schaefer determined that because Complainant had been employed for less a year, she was not yet eligible for FMLA leave. (Tr. 83-84, 106, 108, 145, 151, 155).

14. Though Respondent's Handbook states that it provides reasonable accommodations, according to Schaefer, Respondent's practice is to terminate the employment of any employee who is absent from work without leave accruals, regardless of the reason for the absence. Schaefer explained, "our policy is our policy. We don't have a leave without pay policy, doesn't matter their circumstances." She further acknowledged that it did not matter if the employee was sick. (Tr. 104-05, 111, 139, 155-56; Respondent's Ex. 1)

15. On June 21st, after seeing that Complainant had no remaining sick or vacation time, without speaking to Jones or reaching out to anyone in Complainant's department, Schaefer decided to terminate Complainant's employment. She discussed the decision with Respondent's Chief Executive Officer, Liz Giordano, who approved it. (Tr. 56, 109, 120-21, 138-39, 146)

16. Schaefer and Giordano were not personally aware that Complainant was pregnant or had any pregnancy-related medical conditions at the time they decided to terminate Complainant's employment. (Tr. 121-22, 130, 151-52)

17. At about 10 p.m. that evening, unaware that her employment had been terminated, Complainant left Jones another voicemail informing her that she would be out for the remainder of the week because she was still in the hospital. (Tr. 51)

18. By Thursday the 22nd, Complainant's blood pressure had stabilized and she was discharged from the hospital with a doctor's note clearing her to return to work on Monday June 26th. (Tr. 52; Complainant's Ex. 3)

19. Complainant returned to work on the 26th, with the doctor's note, ready to work. (Tr. 53-54, 108; Complainant's Ex. 3)

20. Complainant met with Schaefer that day, gave her the note and told Schaefer that she was pregnant and had been absent because she had been in the hospital. (Tr. 56, 108, 121-22)

21. Schaefer informed Complainant that her employment was terminated. (Tr. 107-09; Complainant's Ex. 4) Schaefer did not give any consideration to the doctor's note. According to her, Complainant was not asking for an accommodation. She "wasn't disclosing what she was in the hospital for and I was not asking as it was none of my business." (Tr. 138, 140, 143)

22. Schaefer told Complainant that she could reapply for her position as a new hire. Schaefer claimed that she would expedite the rehiring process and have Complainant back to work by the end of the week. (Tr. 57, 85, 109, 111, 131, 133-34, 148-49) Complainant testified that she was not assured she would be rehired and was not offered an expedited process. (Tr. 57, 85) In any event, had she been rehired, she would have lost any accumulated benefits and been required to go through new hire training. (Tr. 133, 148-51; Respondent's Ex. 1) Schaefer's claim that Complainant was guaranteed rehire is not credited. If Schaefer wanted Complainant back to work, there is no evidence as to why she could not have merely reversed the decision to terminate her employment.

23. When Schaefer informed Complainant that her employment was terminated, Complainant immediately became extremely upset. She was confused and was worried about her finances, as her job was her only source of income. Her blood pressure increased. (Tr. 54, 58, 67-68) Schaefer confirmed that Complainant was visibly upset and unable to understand why she had been discharged. (Tr. 108-09)

24. According to Complainant's mother, Complainant was hysterical after her employment was terminated. She was very upset, distraught and had trouble comprehending what had happened. She was extremely stressed. Thereafter, her health declined. Her blood pressure went up again and the following week, Complainant lost the pregnancy. Complainant testified that as a result, "I was in shock. And I became emotionally distraught. This was very hard to even comprehend at the moment. And I had to stay [in the hospital] to be monitored and have a delivery and it took about two days of labor." (Tr. 70) Complainant's mother testified that Complainant initially shut down emotionally. Eventually Complainant saw a therapist on two occasions. (Tr. 26-29)

25. Complainant was thirty-three weeks pregnant at the time. The loss and grieving led to her feeling "very depressed." She felt like she did not know how to deal with the loss of the baby and the loss of her job and her whole life changing in the matter of a week. (Tr. 71) Complainant's distress continued through the day of the hearing. (Tr. 70)

26. After the termination, Complainant applied for and received Unemployment Insurance. She received \$252 per week until the last week of October 2017, when she started working for FRMB Inc., Omnimed Evaluation Services earning \$13.75 per hour for approximately thirty-five to forty hours per week. (Tr. 73-75, 77, 89; Complainant's Ex. 1, 7)

27. According to her earning statement, Complainant earned \$13.25 per hour for regular

work and \$17.23 per hour for weekend work. (Complainant's Ex. 5, 6)

28. Complainant testified that when she started working for Respondent, "I had the intention of growing and possibly seeking higher positions and making a career. And now I'm working somewhere that isn't on track of what I wanted to do. I liked working with individuals that had brain injuries and of that nature and where I am now, I have no room to grow." (Tr. 78)

### **OPINION AND DECISION**

Respondent discriminated against Complainant in violation of the Human Rights Law when it failed to reasonably accommodate her disability and terminated her employment.

The Human Rights Law requires employers to provide reasonable accommodations to the known disabilities or pregnancy-related conditions of its employees. *See* Human Rights Law § 296.3(a). Reasonable accommodations may include modifying employees' work schedules or adjusting schedules for treatment or recovery and providing reasonable time for treatment and recovery. *See* 9 N.Y.C.R.R. §§ 466.11(a)(1) and (2), (c)(3), (i)(1) and (3).

In the instant case, in order to succeed on her claim, Complainant must establish that she was a person with a pregnancy-related condition within the meaning of the Human Rights Law, that her employer was aware of her condition, that with a reasonable accommodation, she could perform the essential functions of her position, and that Respondent refused to make such accommodation. *See Abram v. State Div. of Human Rights*, 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764, 767 (4th Dept. 2010). An accommodation is not required if it would impose an undue hardship on the employer's business operations. *See* Human Rights Law § 296.3(b).

Complainant has met her burden. It is not in dispute that Complainant suffered from a pregnancy-related condition during the relevant period. A pregnancy-related condition is defined in the Human Rights Law to include a medical condition related to pregnancy which is

demonstrable by medically accepted clinical or laboratory diagnostic techniques. The condition must be one that would not prevent a complainant from performing her job in a reasonable manner with a reasonable accommodation. Such a condition is regarded as a temporary condition under the law. *See Human Rights Law § 292.21-f.*

Complainant's doctor diagnosed Complainant as suffering from high blood pressure as a result of her pregnancy. Consequently, Complainant's life and pregnancy were at risk. Other than her need for five days' leave to seek medical attention and recover, Complainant was able to perform the functions of her job. Accordingly, Complainant was a person with a pregnancy-related condition under the Human Rights Law.

Respondent had a policy and practice by which employees were to notify a supervisor when they were to be absent because of illness. By virtue of Complainant having followed that policy and practice, she put Respondent on notice and, thus, Respondent was aware of Complainant's condition. Though Schaefer and Giordano were not personally aware of Complainant's medical status when the decision to terminate her employment was made, Jones, the supervisor whom Complainant notified, received Complainant's messages evidenced by her having called Complainant's mother to follow-up on Complainant's status. In any event, after that call, she was certainly aware of Complainant's condition. It is not apparent why Jones failed to communicate the information to Schaefer, but because Complainant followed Respondent's procedure, Respondent cannot now claim it was unaware. Under traditional agency principles, Jones's knowledge is imputed to Respondent. *See, e.g., Lewis v. Blackman Plumbing Supply L.L.C.*, 51 F.Supp.3d 289, 308 n. 9 (S.D.N.Y. 2014) (supervisor's "knowledge of Plaintiff's disability was sufficient to provide notice to Defendants for purposes of ADA liability") (citing *Brady v. Wal Mart Stores, Inc.*, 531 F.3d 127, 134 (2d Cir. 2008) (finding sufficient notice where

record evidence demonstrated that a boss and a “store manager” perceived the plaintiff to be disabled); *Alexiadis v. Coll. of Health Professions*, 891 F.Supp.2d 418, 430 n. 10 (E.D.N.Y. 2012) (denying a motion for summary judgment where the plaintiff alleged that his supervisors regarded him as disabled); *Davis v. Vt., Dep't of Corr.*, 868 F.Supp.2d 313, 326–27 (D.Vt. 2012) (denying a motion to dismiss where the plaintiff alleged that his “supervisors and coworkers ... regarded [him] as having a disability”); *Price v. City of New York*, 797 F.Supp.2d 219, 232 (E.D.N.Y. 2011) (finding that by alleging “his employer had notice of his alleged disability,” the plaintiff alleged “that he notified both his supervisor ... and his union representative ... about his need for accommodation”); see also *Davis v. Con-Way Freight Inc.*, 139 F.Supp.3d 1224, 1235 (D. Or. 2015), *aff'd*, 715 F. App'x 805 (9th Cir. 2018) (“Defendant is assumed to know everything its agents know.”); *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1184 (11th Cir. 2005) (“when an employer designates a supervisor as an employee’s contact point for personnel matters such as reasonable accommodations, the employer cannot later defend a failure to make reasonable accommodations on the ground that the supervisor failed to relate the employee’s disability to relevant decision-makers within the company.”); *James v. James River Paper Co.*, 1995 WL 938383 (D. Or. 1995), *aff'd*, 101 F.3d 705 (9th Cir. 1996) (where denial of reasonable accommodation and termination are inextricably intertwined, supervisor’s knowledge of disability can be imputed to employer); *Kimbrow v. Atl. Richfield Co.*, 889 F.2d 869, 875-76 (9th Cir. 1989) (where personnel policies are administered through supervisors, including attendance-related matters, knowledge by employee’s supervisor of need for accommodation is imputed to employer under traditional agency principles).

Further, it is reasonable to conclude that even if Schaefer and Giordano had been aware that Complainant was in the hospital, they would have terminated her employment because she

was not entitled to FMLA leave and had no accrued leave and Schaefer believed “the policy is the policy . . . doesn’t matter the circumstances.” However, “[r]easonable accommodation must be considered where the disability and need for accommodation are known to the employer.” 9 N.Y.C.R.R. § 466.11(e)(1); *see also Miloscia v. B.R. Guest Holdings LLC*, 33 Misc. 3d 466, 475, 928 N.Y.S.2d 905, 914 (N.Y. Sup. Ct. 2011), *aff’d in part, modified in part*, 94 A.D.3d 563, 942 N.Y.S.2d 484 (1st Dept. 2012) (“[a]lthough defendants claim that plaintiff did not request an accommodation, it is not disputed that they were aware of his disability and were informed that he needed three to six months to be able to return to work. . . . [A]n employer has an independent duty to reasonably accommodate an employee’s disability if the employer knew or reasonably should have known that the employee was disabled, whether or not a specific request has been made”).

Though, “[t]he employer’s past practice, pre-existing policies regarding leave time and/or light duty . . . [are] important factors in determining reasonable accommodation in this context,” 9 N.Y.C.R.R. § 466.11(i)(3),” an employer is required to provide reasonable time for an employee to recover from temporary disabilities. *See* 9 N.Y.C.R.R. § 466.11(i)(1). Respondent’s belief that “our policy is our policy” is not an adequate basis to deny an accommodation. Employers “cannot avoid engaging in the interactive process contemplated by [the Human Rights Law and the ADA] by citing their policy that employees . . . such as plaintiff, are not allowed medical leave . . .” *Miloscia v. B.R. Guest Holdings LLC*, 33 Misc. 3d at 476 (citing *Phillips v. City of N.Y.*, 66 A.D.3d 170, 177 (1st Dept. 2009), *overruled on other grounds*, *Jacobsen v. N.Y.C. Health and Hosps. Corp.*, 22 N.Y.2d 824 (2014)).

To the extent Respondent’s policy applies even when an employee is suffering a temporary disability, it violates the Human Rights Law. Thus, Respondent’s reliance on that

policy is unpersuasive. Accordingly, Respondent discriminated against Complainant when it failed to provide her the reasonable accommodation of reasonable time for recovery from her pregnancy-related condition and terminated her employment.

Complainant's claims that she was discriminated against based on her sex and familial status are also sustained. The definition of "familial status" includes "any person who is pregnant." Human Rights Law § 292.26(a). Further, before the Human Rights Law explicitly covered pregnancy, the courts consistently held that pregnancy discrimination was covered under sex. *See Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y.2d 211, 216, 613 N.E.2d 523, 524 (1993)

Complainant is entitled to an award of damages as compensation for lost wages. *See* Human Rights Law § 297.4(c). A complainant has a duty to exercise diligence to mitigate her damages. *See Rio Mar Rest. v. State Div. of Human Rights*, 270 A.D.2d 47, 48, 704 N.Y.S.2d 230, 231 (1st Dept. 2000) (citing *State Div. of Human Rights v. North Queensview Homes*, 75 A.D.2d 819, 427 N.Y.S.2d 483 (2d Dept. 1980)). Complainant made diligent efforts to mitigate her damages. She applied for Unemployment Insurance benefits. In order to qualify for unemployment benefits, Complainant had to certify that she was actively seeking employment. Indeed, she was ultimately hired in the last week of October 2017, at a higher salary than she was paid by Respondent. Thus, Complainant has demonstrated that she made diligent efforts to mitigate her damages and Respondent failed to prove otherwise. *See Walter Truck Co. v. State Human Rights Appeal Bd.*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3d Dept. 1979) (burden on Respondent to prove Complainant's lack of diligent efforts to mitigate damages). Complainant provided no evidence from which to determine how many weekend hours she typically worked and thus an award of lost wages based on that higher pay rate would be speculative. At \$13.25

per hour for a thirty-five-hour work week, had she remained employed by Respondent from the date of the termination, June 21 through October 20, 2017, the week she was hired by another employer, Complainant would have earned \$8,115.63 (or \$13.25 \* 35 hours \* 17.5 weeks). Subtracting \$4,410 (\$252 \* 17.5 weeks) in unemployment benefits leaves Complainant with a lost wage award of \$3,705.63. *See State Div. of Human Rights v. Marcus Garvey Nursing Home*, 249 A.D.2d 549, 550 (2d Dept. 1998) (Lost wage award to be reduced by unemployment benefits received); *see also, Allender v. Mercado*, 233 A.D.2d 15 (1st Dept. 1996), *appeal dismissed and leave to appeal denied*, 89 N.Y.2d 1055 (1997). No deductions or withholdings should be made from the lost wage award. *See Bell v. State Div. of Human Rights*, 36 A.D.3d 1129, 1132, 827 N.Y.S.2d 779, 781 (3d Dept. 2007).

Additionally, Complainant is entitled to interest on the lost wage award at a rate of nine percent per annum from August 21, 2017, a reasonable intermediate date, until payment is made. *See Aurecchione v. State Div. of Human Rights*, 98 N.Y.2d 21, 27 (2002).

An award of compensatory damages to a person aggrieved by an unlawful discriminatory practice may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). In determining the amount of damages to be awarded, the following is taken into consideration: the relationship of the award to the wrongdoing; the duration, consequence and magnitude of a complainant's mental anguish, including physical manifestations or psychiatric treatment; and consideration of comparable awards for similar injuries. *See N.Y.C. Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Father Belle Cmty. Ctr. v. State Div. of Human Rights*, 221 A.D.2d 44, 57, 642 N.Y.S.2d 739, 748-49 (4th Dept. 1996); *Bronx County Med. Group, P.C. v. Lassen*, 233

A.D.2d 234, 235, 650 N.Y.S.2d 113, 114 (1st Dept. 1996).

Complainant suffered enormously as a result of Respondent's discriminatory conduct. Her suffering was corroborated by the testimony of her mother and by Schaefer. Complainant testified that when she started working for Respondent, she had the intention of advancing and seeking higher positions and making that work a career. She was gratified by the work. Currently, she is working where she has no room to advance.

While it is impossible on this record to determine to what extent the loss of Complainant's pregnancy was related to her preexisting condition, it is clear that prior to the termination, her blood pressure had stabilized to the point where she was released from the hospital and well enough to return to work. She testified that once her employment was terminated, it caused her great worry, confusion and stress. Both Schaefer and Complainant's mother confirmed that upon being discharged, Complainant immediately became extremely upset. She was confused and was worried about her finances. She became hysterical and extremely stressed. According to Complainant's mother, her health was declining and she was distraught which affected her ability to keep her blood pressure under control. Complainant's high blood pressure was the basis of the preeclampsia. Thus, it is reasonable to conclude that the stress of losing her job while pregnant played some role in the subsequent increase in her blood pressure which eventually led to the loss of her pregnancy.

Complainant was thirty-three weeks pregnant at the time. The loss and grieving led to her feeling very depressed. She felt like she did not know how to deal with the loss of the pregnancy and the loss of her job and her whole life changing in the matter of a week. Complainant visited with a therapist on two occasions and Complainant continued to feel upset through the date of the hearing.

Considering that there were causal factors other than Respondent's discrimination which contributed to Complainant's suffering, but also recognizing that the termination likely contributed to the increase in Complainant's blood pressure, a mental anguish award in the amount of \$50,000 is justified by the duration, consequence and magnitude of complainant's mental anguish and is commensurate with awards for similar injuries. *See N.Y.C. Transit Auth. v. State Div. of Human Rights*, 181 A.D.2d 891, 581 N.Y.S.2d 426 (2d Dept. 1992) (\$450,000 to employee who suffered four instances of discrimination, including denial of accommodation for pregnancy-related disability which resulted in miscarriage. She suffered anguish, guilt, depression and anger for a period of six years and anticipated to continue indefinitely); *Marcus Garvey Nursing Home, Inc. v. State Div. of Human Rights*, 209 A.D.2d at 620 (award reduced to \$75,000 for a complainant who felt lonely, depressed, agitated and tearful for a period of 9.5 months. No evidence as to the severity or consequences of his condition); *Ifrac v Cmty. Health Ctr., Inc.*, Division Case No. 10105630 (May 29, 2009) (award made with consideration that factors apart from discrimination contributed to the complainant's suffering. Respondent's conduct, however, exacerbated the suffering); *Miranto v North Tonawanda*, Division Case No. 10104366 (January 14, 2008) (\$50,000 for a complainant who was devastated and suffered from depression for several months).

Pursuant to Human Rights Law § 297, the Division may assess civil fines and penalties against a respondent found to have committed an unlawful discriminatory practice. In determining the amount of a civil penalty, the Division considers the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent's culpability, any relevant history of the respondent's actions, the respondent's financial resources, and other matters as justice may require. *See Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538

and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

Civil fines and penalties may be assessed up to \$50,000 against a respondent found to have committed an unlawful discriminatory act. If the act is willful, wanton or malicious, the fines may be as high as \$100,000. *See* Human Rights Law § 297.4(c)(vi). In the instant matter, Respondent's actions are not deemed to be willful, wanton or malicious. Respondent's actions did cause Complainant grievous harm and it has failed to take any responsibility. Though the evidence does not specify Respondent's budget or the value of its assets, it appears that Respondent is a not-for-profit corporation that employs approximately 450 employees. Considering the goal of deterrence and Respondent's size and corporate structure, a civil fine and penalty in the amount of \$10,000 is appropriate. *See Noe v. Kirkland*, 101 A.D.3d 1756, 957 N.Y.S.2d 796 (4th Dept. 2012).

### **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, its agents, representatives, employees, successors, and assigns shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$50,000 as compensatory damages for mental

anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.

2. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant a lost wage award in the amount of \$3,705.63. Interest shall accrue on this amount at a rate of nine percent per annum from August 21, 2017, a reasonable intermediate date, until the date payment is made by Respondent.

3. Payments shall be made in the form of certified checks, made payable to the order of Angela Vassallo and delivered by certified mail, return receipt requested, to Complainant's attorney, Christopher Berlingieri, Esq., at Berrlingieri Law, PLLC, 244 Fifth Ave, Suite F276, New York, NY 10001. Copies of the certified checks shall be provided to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, NY 10458.

4. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to the State of New York \$10,000 as a civil fine and penalty for its violation of the Human Rights Law. Payment shall be made in the form of a certified check payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, NY 10458. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.

5. Respondent is directed to immediately cease and desist from employing a policy

that results in the termination of the employment of disabled employees without consideration of whether they can be reasonably accommodated. Within 120 days of the date of this Order, Respondent is to revise its policies and practices to conform to the Human Rights Law and to provide training to its supervisors and employees related to its obligations under the Human Rights Law to provide reasonable accommodations. Simultaneously, Respondent shall provide the Division's General Counsel proof of its revised policies and training.

6. Respondent shall cooperate with representatives of the Division during any investigation into compliance with the directives herein contained

DATED: August 30, 2019  
Bronx, New York



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Peter G. Buchenholz  
Adjudication Counsel