



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

JENNIFER J. WOLFFE,

Complainant,

v.

NEW YORK STATE, STATE UNIVERSITY OF  
NEW YORK AT STONY BROOK, STONY BROOK  
UNIVERSITY HOSPITAL,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10160661

Federal Charge No. 16GB302220

**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 August 28, 2014, by Robert M. Vespoli, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One

Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

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

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **OCT 23 2014**  
Bronx, New York

  
HELEN DIANE FOSTER  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

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**NEW YORK STATE, STATE UNIVERSITY  
OF NEW YORK AT STONY BROOK,  
STONY BROOK UNIVERSITY HOSPITAL,**  
Respondent.

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

Case No. **10160661**

**SUMMARY**

Complainant alleged that Respondent terminated her employment because of her sex and disabilities and failed to provide her with reasonable accommodations for said disabilities. Because the record does not support Complainant's allegations, the instant complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On February 22, 2013, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 16-17, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by James Bouklas and Mark Gaylord, Esqs. Respondent was represented by Michele J. Le Moal-Gray, Esq.

The parties filed timely post-hearing briefs.

### **FINDINGS OF FACT**

1. On September 18, 2008, Respondent hired Complainant to work as a Clerk I in the Health Information Management Department (“HIM”). (Tr. 9)
2. On March 5, 2009, Complainant became a Keyboard Specialist. (Tr. 9)
3. Clerk I and Keyboard Specialist are civil service positions, and Complainant was hired as a provisional employee until she passed the civil service exam. (Tr. 9, 228)
4. On June 11, 2009, Respondent transferred Complainant to the noncompetitive civil service position of Hospital Attendant I. (Tr. 10, 228)
5. Complainant held the minimum qualifications for the Hospital Attendant I position. (Tr. 10)
6. A Hospital Attendant I is required to work forty hours per week. (Tr. 11, 229)
7. During her employment with Respondent, Complainant worked in positions that were

subject to a collective bargaining agreement (“CBA”). (Tr. 12, 209; Respondent’s Exh. 6)

8. The CBA addresses leave options that are granted to employees if they qualify. Leave options include maternity, childcare, sickness, mandatory alternate duty and Voluntary Reduction in Work Schedule (“VRWS”). (Respondent’s Exh. 6)

9. Complainant experienced migraine headaches throughout her employment with Respondent. (Tr. 19, 159)

10. Complainant requested and received intermittent leave under the Family and Medical Leave Act (“FMLA”) from September 28, 2009, to December 31, 2009. Intermittent leave allowed Complainant to be absent from work without pay. Complainant was required to designate any such absence as a FMLA absence. (Tr. 19, 161, 242-43; Respondent’s Exh. 1)

11. Complainant requested and received intermittent leave under the FMLA from January 1, 2010, through December 31, 2010. (Tr. 19, 161-63, 242-43; Respondent’s Exh. 1)

12. Complainant expected to use FMLA intermittent leave three to four times per month. (Tr. 243-44)

13. In October 2010, Complainant became pregnant. (Tr. 159)

14. As a result of Complainant’s pregnancy, she could no longer take her migraine medication. (Tr. 159-61)

15. Because of her migraines, Complainant was unable to work. Complainant used her accrued time and took sick leave with half pay from December 2, 2010, to January 5, 2011. Respondent granted Complainant an extended leave with half pay until February 2, 2011. Respondent then granted Complainant’s request for leave without pay from February 3, 2011, to February 19, 2011. (Tr. 164-65; Respondent’s Exh. 2)

16. On February 8, 2011, Complainant returned to work. Respondent arranged for

Complainant to have access to intermittent FMLA leave when she returned to work. (Tr. 166-68; Respondent's Exh. 2)

17. On June 22, 2011, Respondent granted Complainant's request for maternity leave. (Tr. 11, 30; Respondent's Exhibits 3, 7)

18. On June 27, 2011, Complainant gave birth to her daughter. (Tr. 30; ALJ's Exh. 1)

19. Complainant saw a therapist after the birth of her daughter and was being treated for major depression, postpartum depression, and general anxiety disorder. (Tr. 30-32, 111; Complainant's Exh. 15)

20. Respondent granted Complainant leave with half pay from June 23, 2011, through June 29, 2011. Respondent then granted Complainant maternity leave without pay from June 30, 2011, through August 3, 2011. (Tr. 30; Respondent's Exh. 7)

21. Respondent granted Complainant's request for child care leave from August 4, 2011, through October 12, 2011. Respondent granted Complainant's request for an extension of leave from October 13, 2011, to December 21, 2011. Respondent granted Complainant's request for another extension of leave from December 22, 2011, through January 8, 2012. Respondent then granted a final extension of child care leave, from January 9, 2012, to January 26, 2012. (Respondent's Exh. 7)

22. Complainant was due to return to full-time work on January 27, 2012. (Tr. 31, 215-224; Respondent's Exh. 7)

23. Complainant submitted three applications to transfer to a part-time position, two in December 2011, and one in January 2012. Complainant was not accepted for these positions. (Tr. 58-59; Complainant's Exh. 6)

24. On January 17, 2012, Complainant sent her supervisor, Doreen Wisnewski,

a letter requesting a reduction in her weekly hours from forty hours to twenty-five hours. (Tr. 48; Complainant's Exh. 5)

25. Complainant subsequently met with Christine Edwards, Respondent's director of HIM, and Wisnewski to discuss her employment options. Complainant requested a twenty to twenty-five hour weekly work schedule. Edwards and Wisnewski offered Complainant a 30% reduction in her hours to twenty-eight hours per week under the VRWS program for up to one year. This 30% reduction in work hours was the maximum allowable reduction under the VRWS program. (Tr. 50-51, 229-31; Respondent's Exh. 6)

26. I do not credit Complainant's testimony that Respondent offered the VRWS program reduction for only one month. Complainant maintained regular contact with her union representative; it is not reasonable to conclude that her union representative did not inform her of her rights under the CBA. The record shows that the VRWS program is available to union employees for up to one year. (Tr. 50-51, 211, 230-32, 237; Respondent's Exh. 6)

27. Complainant focused primarily on her child care issues when explaining her need for a reduction in weekly work hours, only mentioning her depression in passing. (Tr. 172, 229, 232, 237, 292, 303; Complainant's Exh. 5; Respondent's Exh. 12)

28. I do not credit Complainant's testimony that Edwards told her that she would not be allowed to take a day off if she was sick or to care for her child if she accepted the VRWS program reduction. Complainant's testimony on this issue was equivocal and her demeanor was uneasy and insincere. (Tr. 50)

29. Edwards credibly denied Complainant's testimony on this issue. (Tr. 238)

30. Tami Goldberg ("Goldberg"), a personnel associate for Respondent, informed

Complainant that she could go to Respondent's Disability Support Services ("DSS") or the Office of Diversity and Affirmative Action ("ODAA") to seek further services if she needed an accommodation. (Tr. 81, 83, 251, 257, 260)

31. On January 19, 2012, Complainant met with Marjolie Leonard, Respondent's interim director of ODAA. Complainant told Leonard that she needed a reduction from forty to twenty hours per week to accommodate her child care needs. Complainant also told Leonard that, without the accommodation she requested, she would "have to quit her job since she [would] have no one to watch her child." (Tr. 81, 269-73; Respondent's Exh. 12)

32. Complainant did not file a complaint with ODAA or ask DSS for assistance. Complainant did not believe that these processes would yield a different result than her meeting with Edwards and Wisnewski. (Tr. 80-82, 157, 257, 274-75; Respondent's Exh. 12)

33. Complainant applied for FMLA related to her migraines and received leave from January 27, 2012, to March 14, 2012. Complainant submitted a note from Dr. Frederic Mendelsohn which stated that Complainant was "unable to work until further notice." (Tr. 174; Complainant's Exhibits 2, 3, 4)

34. On June 1, 2012, Complainant was cleared for part-time work by her psychiatric nurse practitioner, Barbara Ann Defeo NPP. Defeo cleared Complainant to work three days per week, starting June 20, 2012, with a recommendation of one day off between each shift. (Tr. 113-14; Complainant's Exhibits 8, 15)

35. By letter dated June 5, 2012, Goldberg informed Complainant that her leave would be extended from March 15, 2012, to July 7, 2012. Goldberg further informed Complainant that, by the time this leave expired, she would have accumulated over one year of continuous absence from her job. Therefore, under the applicable "Civil Service Law, [Complainant would] be

separated from state service effective July 8, 2012” if she did not return to work that day. (Tr. 77, 218-20; Complainant’s Exhibits 4, 10)

36. On June 8, 2012, Goldberg told Complainant that she would need to be cleared for full-time duty, without restrictions, in order to return to work. (Complainant’s Exh. 9)

37. On June 8, 2012, Complainant sent an e-mail to Wisnewski requesting a reduced work schedule due to “medical illnesses.” Although Complainant stated that she would provide documentation to support her medical condition, no such documentation was provided. (Tr. 157, 250; Complainant’s Exh. 7)

38. Wisnewski credibly testified that she did not believe Complainant’s June 8, 2012, request to be a request for the VRWS program because Wisnewski believed the offer of the VRWS program was “still on the table.” (Tr. 179, 298-99)

39. Complainant told Goldberg she would be cleared for full-time work “in a week and a half.” On June 15, 2012, Defeo wrote a note that cleared Complainant to return to work full-time on July 8, 2012. Complainant never submitted this note to Respondent. (Tr. 113, 221-23; Complainant’s Exhibits 4, 15)

40. Defeo’s treatment notes revealed that Complainant’s condition was improving, and she would be ready to return to work on July 8, 2012, once her medication reached the desired levels in her body. (Tr. 115-18, 120-21; Complainant’s Exh. 15)

41. I do not credit Complainant’s testimony that Defeo wrote the June 15, 2012, note clearing her to return to work full-time as a “mistake” and then threw it away. Complainant’s demeanor when questioned on this issue revealed that she was not confident in her testimony. Complainant averted her eyes, was hesitant with her responses to questions, and provided unpersuasive testimony. Complainant stated that she had documentation that would corroborate

her testimony and that she would produce it at the next scheduled day of the public hearing. Complainant never produced said documentation. (Tr. 115-18, 121, 126-27; Complainant's Exh. 15)

42. Complainant did not return to work on July 8, 2012, and she did not provide further documentation to Respondent. On July 8, 2012, Respondent terminated Complainant's employment. (Tr. 11, 175, 219, 221, 250)

43. Complainant never made a formal request for an accommodation based on her alleged disabilities. Complainant did not avail herself of Respondent's internal antidiscrimination policies and procedures. (Tr. 274, 297; Respondent's Exhibits 10, 11)

44. There is only one part-time employee in HIM. This specialized employee had specific knowledge of the software system used by HIM and did not work under the same supervisor as Complainant. Complainant's supervisor, Wisnewski, had no part-time employees in her charge. (Tr. 204-05, 234-35, 301; Respondent's Exh. 5)

### **OPINION AND DECISION**

It is unlawful for an employer to discriminate against an employee on the basis of sex or disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of unlawful discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The burden then shifts to

Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Under the Human Rights Law, an employer is obligated to provide reasonable accommodations for an employee's known disabilities. Human Rights Law § 296.3. In order to establish a prima facie case for failure to provide a reasonable accommodation, Complainant must demonstrate that: (1) she suffered from a disability; (2) she could perform the essential functions of the position with or without a reasonable accommodation; (3) Respondent was aware of Complainant's need for an accommodation; and (4) Respondent failed to provide a reasonable accommodation. *See Abram v. New York State Div. of Human Rights*, 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764, 767 (4th Dept. 2010).

The record establishes that Complainant is female and that she suffered from certain disabilities related to the birth of her child. A disability is defined under the Human Rights Law as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." Human Rights Law § 292.21. This definition has been interpreted to include medically diagnosable impairments and conditions that are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985). Complainant was diagnosed with postpartum depression, major depression, and general anxiety disorder. Complainant also experienced migraine headaches throughout her employment with Respondent. Respondent was aware of these conditions, and they are clearly disabilities as that term is defined in the Human Rights Law.

Complainant was qualified for the Hospital Attendant I position, and she suffered an adverse employment action when Respondent terminated her employment on July 8, 2012.

However, Complainant has not established that the termination of her employment occurred under circumstances giving rise to an inference of unlawful discrimination. Although an inference of discriminatory intent may be derived from a variety of circumstances, no such circumstances are present in the instant case. The record does not establish that Respondent harbored discriminatory animus toward Complainant because of her disabilities when it terminated her employment. Respondent has a history of granting reasonable accommodations to Complainant based on her disabilities. Moreover, Complainant did not show that other, similarly situated employees who were not part of her protected class were treated more favorably.

Even if Complainant could establish a prima facie case, Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent had consistently accommodated Complainant's medical leave requests during her employment with Respondent. Edwards and Wisnewski offered Complainant a 30% reduction in her hours to twenty-eight hours per week, the maximum allowed under the CBA, for a period of up to one year. Complainant refused this offer because it did not suit her child care needs.

The VRWS program was available to Complainant at all times leading up to the termination of her employment. After the expiration of her child care leave, Respondent allowed Complainant to go on leave due to her own medical conditions. Although Complainant stated that she would provide documentation to support her medical conditions, no such documentation was provided. Respondent extended this leave until July 7, 2012, the time Complainant would have accumulated over one year of continuous absence from her job. Although Complainant

was able to return to work full-time on July 8, 2012, she did not do so. Respondent terminated Complainant's employment at that time pursuant to applicable N.Y. Civil Service Law.

The burden then shifts to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant has failed to meet her burden. Accordingly, Complainant's claim that Respondent terminated her employment because of her sex and disabilities must be dismissed.

Complainant's claim that Respondent failed to provide a reasonable accommodation for her disabilities must also be dismissed.

Complainant met the first element of her prima facie case. As discussed more fully above, Complainant established that she suffered from disabilities as that term is defined in the Human Rights Law.

Assuming, *arguendo*, that Complainant met the second and third elements of her prima facie case, she has not met the fourth element. Respondent had offered a reasonable accommodation to Complainant. Once the need for an accommodation is known, or the employee requests an accommodation, the employer is required to engage in an interactive process with the employee, which includes the discussion and exchange of pertinent medical information, to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. *See Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148-49, 811 N.Y.S.2d 381, 387 (1st Dept. 2006), *lv. appeal denied*, 7 N.Y.3d 707, 821 N.Y.S.2d 813 (2006); *Vinikoff v. New York State Div. of Human Rights*, 83 A.D.3d 1159, 1162, 920 N.Y.S.2d 458, 461 (3d Dept. 2011); 9 N.Y.C.R.R. § 466.11(j)(4). The obligation of reasonable accommodation is limited to the employer's knowledge of the disability. *See Pimentel* at 148, 811 N.Y.S.2d at 387.

Notably, Complainant told Wisniewski and Edwards that she needed to reduce her work hours due to child care issues.

Respondent had consistently accommodated Complainant's medical leave requests during her employment with Respondent. Respondent followed its established procedure and offered Complainant an accommodation to return to work that was available to union members. Complainant failed to provide Respondent with documentation supporting her specific request for a reduced work schedule. Moreover, Respondent had established resources and procedures for dealing with disability accommodation requests. Goldberg informed Complainant that, if she needed additional services for an accommodation based on her disability, she could go to DSS or ODAA. Complainant did not report to DSS for further assistance or file a complaint with ODAA. "An employee who is responsible for the breakdown of [the] interactive process may not recover for a failure to accommodate." *See Vinikoff* at 1163, 920 N.Y.S.2d at 462 (citations omitted).

After Complainant's failure to provide documentation and the breakdown of the interactive process, Respondent still offered Complainant a 30% reduction in her hours to twenty-eight hours per week. This was the maximum allowable reduction under the VRWS program, which was available to Complainant at all times leading up to the termination of her employment. The record shows that Complainant would not accept any offer over twenty-five hours per week due to her child care obligations. There is no medical reason why Complainant could not work twenty-eight hours per week, but could work twenty-five hours per week. Respondent offered a reasonable accommodation and Complainant refused. Respondent is only required to offer a reasonable accommodation, not the specific accommodation requested by Complainant. Respondent "has the right to select which reasonable accommodation will be

provided, so long as it is effective in meeting the need.” 9 N.Y.C.R.R. § 466.11(j)(6).

Finally, the record shows that Complainant’s need for a reasonable accommodation based on her disabilities no longer existed at the time that Respondent terminated her employment. Defeo’s treatment notes indicate that Complainant’s condition was improving and that she would have been ready to return to work on July 8, 2012. Defeo prepared a note clearing Complainant to return to work full-time on July 8, 2012, but Complainant did not provide this note to Respondent.

Accordingly, this claim must also be dismissed.

**ORDER**

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

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

DATED: August 28, 2014  
Hauppauge, New York

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

Robert M. Vespoli  
Administrative Law Judge