



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**FRANCES A. LUTZ,**

Complainant,

v.

**GIOVANNI LOPEZ, QI-HEALTH  
ACUPUNCTURE SERVICES, P.C.,  
ACUPUNCTURE SOLUTIONS, P.C.,**

Respondents.

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

Case No. 10137836

**SUMMARY**

Complainant alleged that Respondents unlawfully discriminated against her based on her status as a domestic violence victim by forcing her to take a period of unpaid leave. Because the evidence does not support Complainant's allegations, the complaint must be dismissed.

**PROCEEDINGS IN THE CASE**

On November 12, 2009, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Acupuncture Solutions, P.C. ("AS") 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 AS 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 June 23 and 24, 2011.

Pursuant to 9 N.Y.C.R.R. § 465.4, the presiding ALJ amended the complaint at the public hearing to add Respondents Qi-Health Acupuncture Services, P.C. and Giovanni Lopez. (Tr. 395-402)

Complainant and Respondents appeared at the hearing. Complainant was represented by Arthur V. Graseck, Jr., Esq. Respondents were represented by Michael A. Miranda, Esq.

Respondents filed timely proposed findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

1. Complainant has two children, a son and a daughter, with her estranged husband, Michael Lutz. (Tr. 42)
2. On March 16, 2006, Complainant filed for divorce. This divorce proceeding was still pending at the time of the public hearing. (Tr. 9, 202-03)
3. Respondent Giovanni Lopez ("Dr. Lopez") is the operator and sole shareholder of Respondent AS. (Tr. 292)
4. Respondent AS operates in an office building in Medford, New York, that is shared by other independent business owners. Respondent AS offers acupuncture and massage therapy services to the general public. (Tr. 286-87)

5. In addition to the Medford office, Respondent Dr. Lopez operates an office in Brentwood, New York. (Tr. 260, 287)

~~6. On April 3, 2006, Complainant began working in Medford for Respondent AS as an acupuncturist. (Tr. 214) Complainant was the only acupuncturist at this location. (Tr. 7-8)~~

7. Throughout 2007 and 2008, Complainant did not exhibit any performance or attendance problems at work. (Tr. 65)

8. Beginning in or about 2009, Complainant began frequently missing work due to court appearances relating to her divorce proceeding. Complainant missed 26 days in the 2009 work year, and she used up all of her vacation, sick, and personal days. (Tr. 307-09)

9. Complainant frequently discussed her divorce proceedings in the office with other workers. (Tr. 344-45)

10. Respondent Dr. Lopez received complaints from his patients that included Complainant talking on the phone while placing acupuncture needles in patients and leaving patients unattended in the acupuncture room. Co-workers were frequently unaware of Complainant's whereabouts because she often left the office abruptly. (Tr. 259-60)

11. Respondent Dr. Lopez informed Complainant that her conduct was adversely affecting the workplace and that he was upset that Complainant was frequently absent from work without giving prior notice. (Tr. 264-65)

12. Respondent Dr. Lopez was frustrated with Complainant's frequent absences because Complainant was the only acupuncturist in the Medford office. This caused interference with Respondent Dr. Lopez's daily business operations because he was often forced to bring in an acupuncturist from another office and hire an additional acupuncturist as a substitute for Complainant when she was not at work. (Tr. 260, 280, 283-84)

13. On or about August, 12, 2009, a blue van appeared at Complainant's home and at Respondent AS's office. (Tr. 51-54)

~~14. The driver of the blue van was an investigator hired to perform surveillance by the attorney for Complainant's estranged husband in the pending divorce proceeding. (Tr. 197-98)~~

15. Complainant had disclosed to other workers in the office that she believed the driver in the blue van was an investigator hired by her estranged husband regarding their pending divorce proceeding. The blue van appeared at other times in the month of August 2009. (Tr. 110-16, 340, 343)

16. Complainant did not personally inform Respondent Dr. Lopez about the appearance of the blue van. (Tr. 260)

17. On August 25, 2009, Jeffrey W. Waller, Esq., Complainant's matrimonial attorney in 2009, wrote a letter informing Respondent Dr. Lopez that Complainant needed to miss work due to court appearances. (Tr. 126, 182-83; Respondents' Exh. 9) This letter did not state or imply that Complainant was a domestic violence victim. (Tr. 190; Respondents' Exh. 9)

18. By letter dated August 26, 2009, Respondent Dr. Lopez offered Complainant two months of unpaid leave in order to "resolve [Complainant's] personal issues without affecting [her] performance and delivery of professional services" to patients. (Tr. 266-67; Respondents' Exh. 2)

19. Before drafting the August 26 letter, Respondent Dr. Lopez verbally offered Complainant two options: taking an extended probationary period or taking a period of unpaid leave. (Tr. 267-69)

20. Because Respondent Dr. Lopez did not want Complainant to lose her job, he provided Complainant an unpaid leave instead of extended probation. Respondent Dr. Lopez felt that

Complainant would most likely violate the terms of her probation in the short term. Complainant accepted the unpaid leave, and Respondent Dr. Lopez guaranteed that she would have her job when she returned to work. (Tr. 258, 267, 276-77; Respondents' Exh. 2)

21. From August 31, 2009, until November 2, 2009, Complainant was out of work on unpaid leave. (Tr. 7-9)

22. Respondents were not aware of any domestic violence issues between Complainant and her estranged husband. Respondents were only aware that Complainant was going through a divorce. (Tr. 263-64, 288)

23. On August 10, 2009, Complainant informed her psychologist, Dr. Simon Zysman, that she was upset because someone reported to the authorities that Complainant left her son at home unattended. Around that time, Complainant's daughter was upset with Complainant and had moved in with Complainant's estranged husband. (Complainant's Exh. 1)

24. On August 12, 2009, the New York State Family Court, County of Suffolk granted Complainant's ex parte application for a temporary order of protection ("T.O.P."), which in pertinent part, ordered Complainant's estranged husband to refrain from acts of violence and corporal punishment against Complainant's son and daughter. (Complainant's Exh. 5)

25. The T.O.P. did not identify Complainant as a domestic violence victim. (Tr. 228)

26. This was the only T.O.P. in effect during the relevant time period. (Tr. 213-15)

27. Respondents were never served with this T.O.P., nor were they aware of its contents. (Tr. 228, 289)

28. Dr. Zysman has been treating Complainant throughout her divorce. (Tr. 24-25, 60) During the relevant time period, Complainant did not inform Dr. Zysman that she was a domestic violence victim. (Tr. 82-83; Complainant's Exh. 1)

29. On September 1, 2009, during a counseling session with Dr. Zysman, Complainant stated that she “was laid off by her employer because of frequent absences and lateness due to court appearances.” Complainant did not indicate that she was a domestic violence victim. (Tr. 26; Complainant’s Exh. 1)

30. Complainant conceded that her estranged husband had never physically abused her. (Tr. 205-06)

31. At the time of the public hearing, Complainant continued to work for Respondent AS as an acupuncturist. (Tr. 199-200, 222)

### OPINION AND DECISION

Complainant alleged that Respondents unlawfully discriminated against her because of her status as a domestic violence victim by forcing her to take a period of unpaid leave. However, Complainant has failed to establish a prima facie case of unlawful discrimination.

It is unlawful for an employer to discriminate against an employee on the basis of her domestic violence victim status. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a). Domestic violence victims are protected from discrimination in employment in order to ensure their economic viability because continued employment is imperative to establish independence from the abuser. *See, e.g., Reynolds v. Fraser*, 5 Misc.3d 758, 763 (2004); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 Fla. St. U. L. Rev. 669, 675-77 (2008).

Complainant has the burden of establishing a prima facie case of discrimination by showing that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under

circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondents to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for their employment decision. The ultimate burden rests with Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

A domestic violence victim is "an individual who is a victim of an act which would constitute a family offense pursuant to subdivision one of section eight hundred twelve of the family court act." Human Rights Law § 292.34. These offenses include disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation, and assault between spouses, former spouses, parents and children, or "members of the same family or household," which includes "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." New York Family Court Act ("FCA") § 812.1.

Complainant is not a member of a protected class because she has not shown that she is a domestic violence victim. The record is devoid of evidence showing that Complainant has brought an action or proceeding against her estranged husband in connection with any of the offenses enumerated in FCA § 812.1. The T.O.P. filed by Complainant on August 12, 2009, the only T.O.P. that was in effect during the relevant time period, ordered Complainant's estranged husband to refrain from acts of violence and corporal punishment against Complainant's children. Complainant filed this ex parte application on the heels of an anonymous tip provided

to the authorities reporting that Complainant had left her son at home unattended. Around that time, Complainant's daughter was angry at Complainant and had moved in with Complainant's estranged husband.

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Despite Complainant's accusations of improper behavior by her estranged husband toward their children, Complainant has not shown that she herself was a domestic violence victim. Complainant admitted that her estranged husband had never physically abused her. Complainant frequently voiced her frustration about her ongoing divorce in the workplace, but she never stated or implied that she was a domestic violence victim. Moreover, she did not inform her psychologist, Dr. Zysman, that she was a domestic violence victim during the relevant time period.

Complainant alleged that she was followed by a blue van to her home and her workplace in August 2009. However, Complainant did not show that the presence of the blue van constituted a family offense under FCA § 812.1. The record firmly establishes that the driver of the blue van was an investigator hired by the attorney for Complainant's estranged husband regarding the pending divorce proceeding. Accordingly, the presence of the blue van was for legitimate litigation purposes. This does not constitute stalking, or any other offense, under FCA § 812.1.

Therefore, the record does not establish that Complainant is a domestic violence victim under the Human Rights Law.

Moreover, Complainant did not show that Respondents were aware of her alleged protected status. Complainant relies solely on supposition and conclusory allegations to show that Respondent Dr. Lopez, the operator and sole shareholder of Respondent AS, was aware of her alleged status as a domestic violence victim. This is insufficient to sustain her claim. *See*

*Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

Neither Complainant nor her attorney informed Respondent Dr. Lopez, or anyone else associated with Respondents, that Complainant was a domestic violence victim.

Furthermore, the presence of the blue van at Complainant's home and workplace did not impute any knowledge to Respondent Dr. Lopez about Complainant's alleged protected status. Complainant did not personally inform Respondent Dr. Lopez about the appearance of the blue van. The record also shows that Complainant informed other workers in the office that she believed the driver in the blue van was an investigator hired by Complainant's estranged husband regarding their pending divorce proceeding.

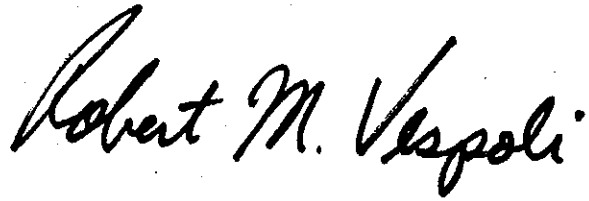
The ultimate burden of persuasion lies at all times with Complainant to show that Respondents intentionally discriminated against her. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to meet her burden.

**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: September 30, 2011  
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