



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KERRY A. ARCIUOLO,

Complainant,

v.

**UNITY INTERNATIONAL GROUP, INC., UNITY
ELECTRIC CO., INC.,**

Respondents.

**and ELECTRICAL EMPLOYERS SELF
INSURANCE SAFETY PLAN, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS
(AFL-CIO), LOCAL 3, Necessary Parties.**

**NOTICE AND
FINAL ORDER**

Case No. 10137716

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 25, 2012, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

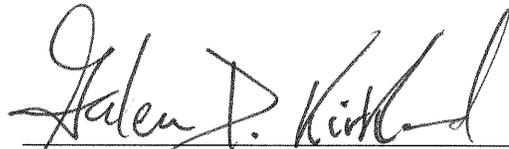
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED
ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D.
KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE
DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of

Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

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

ADOPTED, ISSUED, AND ORDERED.

DATED: 6/22/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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LOCAL 3**, Necessary Parties.

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

Case No. **10137716**

SUMMARY

Complainant alleged that Respondents discriminated against her because of her sex.

Because the evidence does not support the allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On November 2, 2009, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent, Unity Electric Co., Inc., 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, Unity Electric Co., Inc., had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

On December 21, 2011, the complaint was amended to add Unity International Group, Inc., as a Respondent.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on February 1, 2012.

Complainant and Respondents appeared at the hearing. Complainant was represented by Jason L. Abelow, Esq. Respondents were represented by Renee B. Phillips, Esq., of Orrick, Herrington & Sutcliffe LLP.

FINDINGS OF FACT

1. Respondent, Unity Electric Co., Inc. (“Unity Electric”), is an electrical contractor servicing financial institutions. Respondent, Unity International Group, Inc., is the owner of Unity Electric. (ALJ’s Exhibit 5; Tr. 44, 143-44, 226)

2. In 1999, Complainant began her employment, on a part-time basis, with Unity Electric as a receptionist. In or around 2001, Complainant became a full-time employee of Unity Electric as a member of the administrative staff with the title of administrative assistant. (Complainant’s Exhibit 8; Tr. 117-18, 185)

3. In December of 2008, Complainant became pregnant. (Tr. 21-22)

4. In December of 2008, Unity Electric had approximately 500 employees, categorized in two groups: overhead and field. An administrative assistant was considered part of the overhead group. According to Geraldine Campbell (“Campbell”), the Chief Financial Officer for Unity Electric in 2008 and 2009, “Overhead is officers, purchasing agents, secretaries, accounting staff. Basically that is -- project managers, draftsmen. Field are journeymen, electricians and helpers and foremen.” (Tr. 114, 117, 123-24, 185, 225-32)

5. In 2009, Complainant worked in Unity Electric’s telecommunications department with responsibilities that included performing work on purchase orders. In 2009, Complainant was a member of the union known as the International Brotherhood of Electrical Workers, AFL-CIO Local 3 (“the union”). (Tr. 19-20, 44-46, 92-93, 116, 133, 135-36, 142-43, 227-29)

6. By early 2009, Complainant had informed Alvaro Castroagudin (“Castroagudin”), her supervisor, and Marie Lane (“Lane”), a representative of the union, that she was pregnant. In 2009, Cynthia Harvey (“Harvey”), Unity Electric’s payroll manager, and Campbell also learned that Complainant was pregnant. Harvey and Campbell have known Complainant since she started in 1999. (Tr. 22-28, 132, 189, 229, 236-37, 241-42, 245)

7. Harvey has been Unity Electric’s payroll manager for over fourteen years. In 2009, Harvey was also a shop steward for the union. Unity Electric did not have a Human Resources Department, so Harvey assumed the traditional responsibilities of a Human Resources director. As both payroll manager and shop steward, Harvey informed an employee of her benefits if she became pregnant. (Tr. 93, 114-17, 124-30)

8. In 2009, pursuant to a plan that Unity Electric had with the union, a female employee of Unity Electric who gave birth was entitled to maternity leave. The female employee was entitled to eight weeks of compensated leave if the employee experienced a vaginal delivery (“eight-

week compensated leave”), or twelve weeks of compensated leave if the employee experienced a Cesarean section (“twelve-week compensated leave”). Pursuant to The Family and Medical Leave Act of 1993, an employee who gave birth experiencing a vaginal delivery was entitled to an additional four weeks of leave (“FMLA leave”) that was uncompensated. (Tr. 24-27, 129-30, 192-94, 243-44)

9. In 2009, Complainant spoke with Harvey and Lane, and inquired about maternity leave, asking about the eight-week compensated leave and the FMLA leave to which she would be entitled, and about what she had to do to take advantage of these leaves. Complainant knew of other female employees of Unity Electric who gave birth, went on maternity leave, and returned to work. In 2009, in fact, Complainant was training Margaret Dinardo (“Dinardo”) to do Complainant’s work while Complainant was on leave. Complainant knew that Dinardo had taken a maternity leave and, thereafter, returned to work. (Tr. 24-35, 46, 53-54, 93-94, 97-98, 137-38, 190-94)

10. Complainant enjoyed the work environment at Unity Electric and continued to enjoy it after informing Castroagudin, Harvey and Lane that she was pregnant and that she was interested in taking maternity leave. Complainant did not notice any change in the work environment, after she announced that she was pregnant. (Tr. 98-99)

11. During 2009, due to the downturn in the economy, Unity Electric experienced a loss in profits, necessitating layoffs in the workforce. In July of 2009, Unity Electric began to lay off employees in the field group. Campbell was responsible for determining who was laid off. According to Campbell, field employees were usually laid off before administrative employees, “The overheads usually take longer than the field. It’s very difficult to terminate administrative

people. They have been with us a long time. They are, you know, the core of the company, really.” (Tr. 230-32)

12. On July 22, 2009, Complainant gave birth. On or about July 22, 2009, Complainant began her maternity leave. When Complainant began her maternity leave, she was under the impression, based on her earlier conversations with Harvey and Lane, that once she submitted the paper work for the eight-week compensated leave, there was no additional paperwork necessary for the FMLA leave. Complainant was further under the impression that Harvey knew that she was taking the FMLA leave, extending the total amount of her maternity leave to twelve weeks. Harvey was under the impression that she had made it clear to Complainant that, if she was going to take the additional FMLA leave, she had to so inform Harvey and fill out additional paperwork. (Tr. 24-35, 56, 91, 93, 97, 101, 129, 131-32, 134, 137-40, 143-44, 191-94, 241)

13. While Complainant was on maternity leave, Unity Electric laid off approximately 149 employees, including three from the administrative staff. (Tr. 144, 213)

14. While Complainant was on maternity leave, Campbell and Harvey remember Complainant visiting Unity Electric with her baby. Campbell remembers the visit as a social visit with other employees present and does not remember anything being said about returning to work. Harvey is certain that, during a visit, she did not speak with Complainant regarding Complainant’s return. (Tr. 140, 238-39, 248-50)

15. In September of 2009, Campbell had decided that the telecommunications department could not have two administrative assistants. When Complainant’s eight-week compensated leave was over, Campbell asked Castroagudin and Harvey if Complainant was returning. At this time, Campbell received no definite response. (Tr. 229-30, 244-48)

16. By e-mail dated October 6, 2009, Complainant informed Castroagudin that she would be returning to work on October 15, 2009. Castroagudin never informed Campbell of this e-mail or that Complainant intended to return to work on October 15, 2009. (Complainant's Exhibit 1; Tr. 40-41, 252-54)

17. On October 15, 2009, Complainant returned to work. Castroagudin was not in the office that day, but Complainant made a telephone call to him, spoke with him, and informed him that she was in the office. On October 15, Complainant worked with Dinardo on purchase orders. (Tr. 46-47)

18. On October 15, 2009, when Campbell learned that Complainant had returned to work, she contacted Castroagudin and Nicholas DeMaio ("DeMaio"), Unity Electric's superintendent. Campbell informed Castroagudin and DeMaio that, now that Complainant had returned, they had to make a decision as to which administrative assistant to keep and which one to lay off, since keeping both of them was not an option given the economic downturn and loss in profits. (Tr. 72, 230, 234)

19. According to Campbell, several factors were considered in deciding to keep Dinardo and to layoff Complainant. Those factors included the fact that Dinardo had more seniority than Complainant and that Castroagudin had voiced his opinion that Dinardo was doing a very good job and that she made fewer mistakes than Complainant. In Campbell's opinion, Complainant had returned late from her maternity leave, that is, after the eight-week compensated leave was over, and that was also considered. (Respondent's Exhibit 1; Tr. 117, 141, 214, 232, 256-57)

20. On October 16, 2009, after Campbell decided that Dinardo would remain as the administrative assistant, she met with Complainant and explained the situation. Campbell told Complainant she could either take more unpaid leave or be laid off and collect unemployment

insurance benefits. When Complainant chose the option of being laid off, Campbell, trying to find something positive for Complainant out of the experience, commented that she would now have more time to spend with the baby. (Tr. 167-69, 236-37)

21. After Complainant was laid off, she spoke with a union representative who said there was nothing the union could do about the layoff. (Tr. 102-04)

22. For Unity Electric, the effects of the downturn in the economy continued into 2010, with continued loss in profits and more layoffs. In February of 2010, Dinardo was laid off. (Tr. 91, 96, 142, 227-28)

23. Harvey and Campbell both gave consistent, straightforward testimony that Unity Electric took no actions with the intent to discriminate against Complainant because of her sex, because she was pregnant, or because she decided to take advantage of any leave provisions. (Tr. 173-74, 237-38) Questioning of Harvey and Campbell at the public hearing failed to establish any inconsistency or evasiveness in their testimony or any change in their demeanor. (Tr. 114-222, 225-261)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sex. *See* Human Rights Law § 296.1(a).

Complainant alleged that Unity Electric unlawfully discriminated against her after she became pregnant, had a baby, and took a maternity leave. She further alleged that, within two days of returning from her maternity leave, Unity Electric unlawfully discriminated against her when, in making its decision to terminate her employment, it considered the fact that

Complainant took maternity leave.

Complainant has the burden to establish by a preponderance of the evidence that such discrimination occurred. To meet her burden to establish that unlawful discrimination occurred, Complainant must initially show by a preponderance of the evidence 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 unlawful discrimination. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

Complainant has met her initial burden by presenting evidence that she was a ten-year employee of Unity Electric who became pregnant, took a maternity leave, and had her employment terminated within two days of returning to work. Therefore, Complainant has established a prima facie case, the burden of which has been described as “de minimis.” *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998). Because Complainant has established a prima facie case of discrimination, the burden shifts to Unity Electric to establish that the termination of employment was motivated by a legitimate, nondiscriminatory reason.

Unity Electric has established that the termination of employment was motivated by a legitimate, nondiscriminatory reason. Complainant’s employment was terminated because Unity Electric was experiencing a loss in profits which necessitated layoffs in the workforce. In determining whether to terminate the employment of Dinardo, a female employee who had also taken a maternity leave during her employment with Unity Electric, or Complainant, Campbell weighed several factors, which included seniority and the praise of Dinardo’s work by Castroagudin. Although Campbell also considered what she understood to be Complainant’s late

return from maternity leave, I find no discriminatory animus in Campbell's actions or in the actions of Harvey. I determine that Unity Electric's contention of a legitimate, nondiscriminatory reason for its actions was not merely a pretext for unlawful discrimination. *Mittl*, 100 N.Y.2d at 330.

When a complainant raises an issue of unlawful discrimination, she has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that Complainant has failed to meet the burden of showing that conduct attributed to Respondents constituted unlawful discrimination in violation of the Human Rights Law. *See Ferrante*, 90 N.Y.2d at 630; *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). Therefore, the complaint must 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 complaint be, and the same hereby is, dismissed.

DATED: May 25, 2012
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas J. Marlow". The signature is written in a cursive style with a large, stylized initial 'T'.

Thomas J. Marlow
Administrative Law Judge