ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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

**JESSICA L. BROOKING,**

Complainant,

v.

**AFZ GOURMET, INC. D/B/A DENNY'S, INC.,**

Respondent.

**NOTICE AND FINAL ORDER**

Case No. 10123886

**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 September 14, 2010, by Edward Luban, 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: APR 08 2011
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

DAVID A. PATERSON
GOVERNOR

**NEW YORK STATE**
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on the Complaint of

**JESSICA L. BROOKING,**

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Respondent.

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

Case No. **10123886**

## SUMMARY

Complainant alleged that Respondent terminated her employment on her first day because she was pregnant. Because the evidence does not support the allegations, the complaint is dismissed.

## PROCEEDINGS IN THE CASE

On February 29, 2008, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on September 9, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Martha A. Lyons, Esq.

The Division and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division, pursuant to 9 NYCRR § 465.12 (d)(2).

On January 6, 2010, ALJ Luban served proposed Recommended Findings of Fact, Opinion and Decision, and Order upon the parties.

On January 28, 2010, the Division filed Objections to the proposed Recommended Order.

On March 25, 2010, pursuant to 9 NYCRR § 465.20 (a), the Commissioner of the Division reopened the hearing record to obtain the testimony of the Division Investigator who conducted the investigation of the complaint. (ALJ's Exhibit 8)

After due notice, the case came on for hearing before ALJ Luban. Another public hearing session was held on June 8, 2010.

Complainant and Respondent appeared at the hearing. The Division was again represented by Mr. Zyra. Respondent was again represented by Ms. Lyons.

The Division and Respondent filed letter briefs after the conclusion of the reopened hearing.

## FINDINGS OF FACT

1. Complainant is a female. (Tr. 15)

2. Respondent operates a Denny's restaurant ("the restaurant") in Oneonta, New York. (Tr. 16-17, 168-69, 262)

3. Jane Brown is a manager of the restaurant. Brown has authority to hire and fire, and she supervises waitresses/servers and cooks.[1] (Tr. 168-69, 280)

4. Brown has 56 years of experience in the restaurant business, including waitressing. Brown believes that a server must have an outgoing personality and be enthusiastic. (Tr. 176, 191)

5. In February 2008, Complainant applied for a server position at the restaurant. Brown and Michael Hall, another manager, interviewed Complainant. Respondent hired Complainant and directed her to report for training the following week. (Tr. 8-9, 16-17, 173, 174)

6. At the time of Complainant's interview, she was approximately three months' pregnant. Complainant did not mention her pregnancy during the interview. (Tr. 20)

7. Respondent does not guarantee new employees full-time status, and it did not hire Complainant for a specific shift or number of hours. Complainant would have begun as a part-time employee working six or seven hours two to three days per week. (Tr. 178-79, 200, 266)

8. The essential duties of a server included seating customers, taking food and beverage orders, waiting on tables, serving food, and cleaning and bussing tables. (Tr. 9, 96)

[1] Respondent uses the terms "waitress" and "server" interchangeably. (Tr. 96)

9. On February 19, 2008, Complainant reported to the restaurant for training. Brown introduced Complainant to Kayla Thompson, another server, who was to train her. (Tr. 8, 20, 22-23, 172, 174)

10. A trainee is expected to shadow the server who is training her; start taking drink orders; start learning the menu; and learn how to roll silverware, bus tables, and carry trays. (Tr. 97)

11. Thompson showed Complainant how to serve drinks and pour coffee. Complainant had difficulty with these tasks. Thompson told Complainant that when serving coffee, she should pick the cup off the table and turn to the side, so the coffee did not spill or splash on customers. However, Complainant left the cup on the table when she poured the coffee. Complainant did this several times before she was able to pour coffee correctly. (Tr. 99-100, 102-04, 131)

12. Thompson also showed Complainant how to make hot chocolate. This involved putting a cup in the hot chocolate machine, pressing a button, and adding whipped cream. Complainant could not get this right every time. (Tr. 100; Complainant's Exh. 6)

13. Complainant was quiet and shy at the tables, and she was not a quick learner. According to Thompson, Complainant "couldn't catch on" and "just really didn't have it." Thompson concluded that "waitressing was obviously not a good job for (Complainant)." (Tr. 104-06, 165, 342; Complainant's Exh. 6)

14. During the training, Brown observed that Complainant "was not at all enthusiastic. She didn't act like she wanted to be there." Brown also observed that Complainant failed to acknowledge customers who were standing by the door and that she failed to take a coffee cup off the table when she poured coffee. (Tr. 175, 177)

15. Based on her observations, Brown felt that Complainant "was not going to make it" as a server. (Tr. 212)

16. During a break that morning, Complainant learned that Thompson was five or six months' pregnant. Complainant told Thompson that she too was pregnant. Thompson asked if Complainant had told Brown or anyone else at the restaurant that she was pregnant. Complainant replied that she had not. Thompson suggested that Complainant tell Brown. (Tr. 26, 107-09, 111, 126)

17. At one point during the morning, Thompson told Brown that Complainant was not "going to make it" as a server. (Tr. 182-83, 211-12)

18. At approximately 11:45 a.m., Brown told Complainant that Respondent would not continue her employment. Respondent paid Complainant for the time she spent in training. (Tr. 9-10, 28, 188)

19. Brown acknowledged that she learned that Complainant was pregnant that same day. Brown could not recall the time of day she learned of Complainant's pregnancy. However, Complainant's pregnancy was not a factor in Brown's decision to terminate her employment. (Tr. 183, 237)

20. During Brown's four years as the restaurant's manager, there have been other occasions on which she has decided not to retain a trainee after approximately the first hour of the trainee's employment. (Tr. 192, 194)

21. Respondent has an informal policy that servers who are in "advanced" stages of pregnancy provide a doctor's note stating that they can meet the physical requirements of their job. Servers who are unable to perform the physical duties of their position are offered hostess positions, which are less physically demanding. (Tr. 182, 184, 225-26, 228-29, 274, 277, 285-87, 295)

22. Thompson was pregnant while she was employed at the restaurant. Thompson continued to work as a server during her pregnancy, but she could not lift heavy items and she was excused from tasks that involved climbing or reaching. (Tr. 95, 111, 228, 298)

23. Jennifer Liddle, a neighbor of Complainant, was the person who recommended that Complainant apply for a position at the restaurant. Liddle was employed as a server at the restaurant at the time Complainant was hired, and she continues to be so employed. (Tr. 66, 240-41)

24. Liddle has been pregnant twice during her employment at the restaurant. Respondent did not impose any limitations on Liddle's employment during her pregnancies. Liddle took time off from work during both her pregnancies, and she returned to work at the restaurant after those breaks. (Tr. 248-51)

25. On February 29, 2008, Complainant filed her complaint with the Division. (ALJ's Exh. 1)

26. In April 2008, Sandra Carlin, a Human Rights Specialist II with the Division, was assigned to investigate Complainant's complaint. (Tr. 316, 318)

27. On August 21, 2008, as part of her investigation, Carlin spoke with Thompson by telephone. Carlin did not put Thompson under oath for the interview. Carlin did not record the interview, but she made handwritten notes from which she prepared a summary right after the interview. Carlin's summary is not a verbatim record of the interview. (Tr. 321, 323-25, 337, 338, 343; Complainant's Exh. 6)

28. Thompson worked at the restaurant for approximately two years, until August 2008. Thompson was no longer employed by Respondent at the time she testified at the public hearing. (Tr. 92-94; Complainant's Exh. 6)

29. When Thompson testified at the public hearing, she acknowledged that she did not recognize Complainant. (Tr. 97, 116-17) I do not find Thompson's statement significant. The record contains no evidence that Complainant's appearance on the day of the hearing was the same as her appearance on the day Thompson met her, approximately 18 months earlier.

30. Carlin testified at the reopened public hearing based solely on her summary of the interview with Thompson. Although Carlin testified that she believed her summary to be an accurate account of that interview, she had no independent recollection of the interview. (Tr. 336-37)

31. Carlin testified that Thompson told her during the interview that Thompson did not tell Brown anything about Complainant's performance during the morning she trained Complainant. (Tr. 335; Complainant's Exh. 6) However, both Thompson and Brown testified that Thompson did tell Brown how Complainant was doing. (Tr. 151, 182) I credit Thompson's and Brown's sworn first-hand testimony over Carlin's testimony from her summary of the interview with Thompson.

## OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of sex. Human Rights Law §296.1(a). Pregnancy discrimination is a form of sex discrimination. *Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003); *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); *Brooklyn Union Gas Co. v. New York State Human Rights App. Bd.*, 41 N.Y.2d 84, 390 N.Y.S.2d 884 (1976).

Complainant may establish a prima facie case of discrimination because of pregnancy by

demonstrating that she is a member of a protected class, that she was discharged from a position for which she was qualified, and that the discharge occurred under circumstances which give rise to an inference of discrimination. *Mittl* at 330, 763 N.Y.S. 2d at 520. If Complainant establishes a prima facie case, the burden shifts to Respondent to show that it discharged Complainant for a legitimate non-discriminatory reason. If Respondent does so, Complainant must demonstrate that the reason offered by Respondent was merely a pretext for unlawful discrimination. *Id.*; *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 630, 665 N.Y.S. 2d 25, 29 (1997).

Complainant, who was pregnant, is in a protected class. Complainant was qualified for her position when Respondent hired her. Whether or not her performance was satisfactory is a different issue. *Slattery v. Swiss Reinsurance America Corp.*, 248 F. 2d 87, 92 (2d Cir. 2001), *cert. den.*, 534 U.S. 951, 122 S. Ct. 348 (2001). Brown discharged Complainant the same day she learned that Complainant was pregnant. This is sufficient to give rise to an inference of discrimination. Complainant has therefore met her burden of establishing a prima facie case.

However, Respondent has presented a legitimate, non-discriminatory reason for discharging Complainant. Based on their observations during Complainant's training, Brown and Thompson believed that Complainant would not be successful as a server. Complainant had difficulty completing simple tasks, and she did not display the enthusiasm that Brown and Thompson believed the position required.

Complainant failed to show that Respondent's explanation for her discharge was a pretext for unlawful discrimination. Complainant did not rebut Respondent's evidence about her performance during training. The Division contends that Thompson did not tell Brown about Complainant's progress during Complainant's training. Thompson's and Brown's sworn testimony contradicts this contention. In addition, Brown herself observed Complainant's

performance and found it lacking. Finally, Carlin's summary of her interview with Thompson confirms that Thompson did not believe that Complainant would be successful as a server.

Complainant also failed to show that Respondent had any animus toward pregnant employees. On the contrary, the evidence establishes that Respondent accommodated Thompson, Liddle, and other employees during their pregnancies. The Division argues that Respondent's policy of asking pregnant employees for a doctor's note later in their pregnancies is discriminatory. However, this policy was never applied to Complainant, and it is not an issue here.

The ultimate burden of proving unlawful discrimination always remains with Complainant. *Ferrante* at 630, 665 N.Y.S. 2d at 29. Complainant's conclusory allegation that her employment was terminated because she was pregnant is insufficient to meet that burden. *Gagliardi v. Trapp,* 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995). Because Complainant failed to sustain her burden of proving unlawful discrimination, 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: September 14, 2010
Syracuse, New York

Edward Luban
Administrative Law Judge