NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

RAQUEL DE LA HOZ,

Complainant,

v.

TOKYO PARK LTD.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10115881

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 February 22, 2008, by Lilliana Estrella-Castillo, 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 KUMIKI GIBSON, 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, this 17th day of March, 2008.

KUMIKI GIBSON
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10115881**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her when it terminated her employment shortly after she informed Respondent that she was pregnant. The record supports Respondent's position that it did not discriminate against Complainant, but that her employment was terminated as a result of Respondent's financial situation which necessitated the termination of several of Respondent's employees, including Complainant.

PROCEEDINGS IN THE CASE

On January 30, 2007, 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 Lilliana Estrella-Castillo, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 7, November 19 and November 20, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels. Respondent was represented by Shlomo Levi, who appeared *pro se*.

The Division filed timely proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant alleged that her employment was unlawfully terminated shortly after she informed Respondent that she was pregnant. (ALJ Exhibit 2)

2. Respondent denied discrimination, and argued that its decision to terminate Complainant was based on economic necessity and the fact that Complainant was the last employee hired. (ALJ Exhibit 5)

3. Respondent started to conduct business in the United States in 2004. (Tr. 204)

4. Respondent started a wholesale shoe import business, apparently with big dreams and little money. (Tr. 179, 199)

5. Respondent hired Complainant on September 27, 2005, as a Sales Assistant, at a salary of $400.00 per week. (Tr. 22, 36, 66; ALJ Exhibit 2)

6. Complainant was hired to replace another employee whom had been terminated because Respondent could not afford her salary of $700.00 a week. (Tr. 176)

7. Respondent hired Complainant because she could do the job at a "cheaper" salary. (Tr. 176, 200)

8. Respondent's business was very small, therefore, Complainant and Shlomo Levi, Respondent's Managing Agent, worked together every day. (Tr. 98-99)

9. In November 2005, Complainant found out that she was pregnant. (Tr. 22-23)

10. In January 2006, Complainant informed Respondent's bookkeeper, Agatha Koscinska, that she was pregnant. (Tr. 23, 26) During this same time period, Respondent and another business, Global China, joined their businesses into the same office space and reduced their sales group in an effort to share their expenses. (Tr. 203-4) Complainant also received a salary increase that had been promised at the time of her hire. (Tr. 36, 66)

11. On February 8, 2006, prior to a trip to Las Vegas where Respondent was participating in a sales convention, Complainant informed Levi that she was pregnant. (Tr. 27, 99, 104, 167)

12. Levi congratulated Complainant on her pregnancy, but was not surprised because she was about five months pregnant at the time, and he was aware of her pregnancy since December 2005. (Tr. 28, 54, 56; Complainant's Exhibit 2)

13. Everybody in the office became aware that Complainant was pregnant in December 2005, but Levi did not feel that it was appropriate to inquire from Complainant as to her state of pregnancy. (Tr. 58, 174, 178)

14. Upon their return from Las Vegas, Levi had a meeting with his partners from Israel, whom determined that Respondent was not doing well financially and had to terminate some employees. (Tr. 28-29, 170-171, 173-175)

15. On February 17, 2006, Respondent terminated Complainant's employment because she was the last hired. (Tr. 32-33, 175) Complainant received a letter of recommendation, and a severance payment in the amount of $1,000.00. (Tr. 85, 87, 93, 95, 97)

16. Complainant was very upset as a result of the termination, but agreed with Respondent that business was slow, and there was "not a lot of work." (Tr. 108, 111)

17. At the time that Complainant was hired Respondent had seven employees in its employ. (Tr. 108).

18. A month after Complainant started her employment with Respondent, an employee, Lorraine Elkins, left. (Tr. 77-78)

19. After Complainant was terminated on February 17, 2006, Respondent terminated Jenny Zeng on March 10, 2006. Zeng had been employed by Respondent for about eighteen months prior to her termination. (Tr. 73)

20. Shortly after Zeng, another employee, Sean Bartal, was also terminated. He was employed by Global China, the company that joined Respondent in January 2006. (Tr. 158-159, 161)

21. In July 2006, Liza Torres, the receptionist was terminated. (Tr. 221)

22. In July 2006, Koscinska, who had been employed since August 2005, left Respondent's employ for a better job opportunity. Koscinska left Respondent's employment because of Respondent's bad financial situation. (Tr. 157, 161-162)

23. Respondent also terminated Ariel Frankel, Complainant's supervisor, in December 2006. (Tr. 222-223)

24. Respondent only has two employees left, Moshe Maman, Global China's principal, and Jenny Chen. (Tr. 177)

25. Complainant also argued that she was replaced by another employee. However, that employee, "Tal" was a family member of Levi who was in the United States from Israel, and was not paid a salary and after three months returned to Israel. (Tr. 33, 63)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer "because of . . . sex . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a). Pregnancy discrimination is a form of sex discrimination. *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 390 N.Y.S. 2d 884, 359 N.E.2d 393 (1976); *Mittl v. New York State Division of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518, 794 N.E.2d 660 (2003)

In order to establish a claim of sex discrimination based on pregnancy, Complainant must first make out a prima facie case by showing that she was a member of a protected class; that she satisfactorily performed her job duties; and that she was terminated under circumstances that gave rise to an inference of discrimination. *Pace College v. Commission on Human Rights of the City of New York,* 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

If Complainant succeeds in establishing a prima facie case, Respondent must then articulate legitimate, non-discriminatory reasons for its actions. Complainant must then demonstrate that the reasons articulated by Respondent are merely a pretext for unlawful discrimination. *Pace College, supra.*

Complainant made out a prima facie case of unlawful sex discrimination based on pregnancy. Complainant was pregnant and was performing her duties satisfactorily at the time that her employment was terminated shortly after she told Respondent's managing agent that she was pregnant.

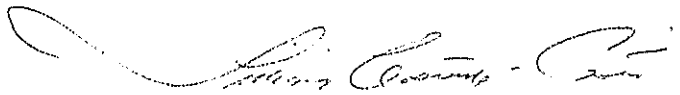
Respondent offered legitimate, non-discriminatory reasons for its decision to terminate Complainant. Respondent showed that Complainant was the last employee hired, and the first employee terminated when their financial situation started to worsen. Moreover, Complainant was not the only employee terminated. The record supports Respondent's position that other employees were also terminated shortly after Complainant's employment was terminated. The record also showed that Respondent's economic situation had not improved since Complainant's termination. At the time of the hearing Respondent had two employees left in its employ.

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 case be, and the same hereby is, dismissed.

DATED: February 22, 2008
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge