NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

KIMBERLY GORDON,

Complainant,

v.

MT.KISCO PODIATRY, P.C.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10109503

PLEASE TAKE NOTICE that the attached is a true copy of an Order issued by Matthew Menes, Adjudication Counsel, as designated by the Honorable Kumiki Gibson, Commissioner of the New York State Division of Human Rights ("Division"), after a hearing held before Robert Tuosto, an Administrative Law Judge of the Division. 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.

DATED: December 17, 2007
Bronx, New York

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MATTHEW MENES
Adjudication Counsel

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

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Case No. **10109503**

SUMMARY

Complainant alleged that she was unlawfully discriminated against on the basis of her sex (pregnancy). Respondent countered that the Division lacked jurisdiction because Respondent did not have four employees during the relevant time period. Respondent did have four employees, thereby giving the Division jurisdiction, however, Complainant failed to prove that she was unlawfully terminated because of her sex (pregnancy), and, thus, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On December 23, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with an unlawful discriminatory practice 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on September 12, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Tom East, Esq. Respondent was represented by George A. Sirignano, Jr., Esq., of the law firm of Enea, Scanlan & Sirignano.

On October 19, 2007, ALJ Tuosto issued a recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). Objections to the Recommended Order from Complainant's attorney were received by the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. From September 2003 to June 2005, Complainant was employed by Respondent as a receptionist. (Tr. 20)

2. Respondent is a professional corporation offering podiatric services to the public. Dr. Michael Giannone, Respondent's sole officer and director, formed Respondent and receives a salary for his services as a licensed podiatrist. Giannone hired and fired employees, determined salaries and office hours, and ran both Respondent's business and medical functions. Gianone supervised all employees; no one supervised Giannone. Giannone was the only one to share in Respondent's profits. (Tr. 122-23, 125-26, 198-99)

3. During the relevant time period, Respondent had two other individuals on its payroll in addition to Giannone and Complainant: David Gordon and Dawn Lincoln. (Tr. 123-24, 198)

4. Lincoln, Respondent's office manager, was pregnant at the time that Giannone hired her, and she has worked for him since that time. (Tr. 138-40, 194, 221)

5. In March 2004, both Complainant and Lincoln acknowledged receiving and reading Respondent's employee handbook. The handbook required, among other things, that employees who request leaves of absence do so in writing beforehand. (Respondent's Exhibits 1, 2, 3; Tr. 53, 57)

6. On July 1, 2004, Lincoln requested, in writing, that she be granted maternity leave. (Respondent's Exhibit 4; Tr. 141, 194, 228)

7. Complainant was due to give birth in Spring 2005. Complainant did not request maternity leave. (Tr. 21, 57, 116, 129, 131, 154-55, 230)

8. In March 2005, Giannone placed an advertisement for Complainant's temporary replacement in anticipation of her maternity leave. (Tr. 149) No one was hired for the position at that time. (Tr. 151)

9. On or about April 14, 2005, Complainant went on leave. (Tr. 68) Complainant claimed that she was given permission for an eight week leave, but Lincoln and Giannone dispute that assertion. (Tr. 23, 129, 152, 214) Giannone contends that he expected Complainant to return to work after being out on leave for approximately two weeks, which he believed would be a sufficient amount of time for Complainant to "feel better" and contact the office. (Tr. 156, 184-86, 188, 191)

10. On April 20, 2005, Complainant gave birth to her child. (Tr. 68)

11. Complainant did not have any subsequent contact with Respondent for approximately eight weeks, other than for a single visit she made to the office on May 20, 2005, during which Complainant did not speak to either Giannone or Lincoln. (Tr. 70-75, 129, 214-17)

12. During the time of Complainant's absence from the office, Giannone and Lincoln were "dumbfounded" that Complainant had not contacted either of them to arrange for her return to work. (Tr. 237)

13. Giannone attempted to contact Complainant by calling her at home, but, upon attempting to do so, discovered that Complainant's phone number had been disconnected. (Tr. 147, 185)

14. David Gordon, Complainant's brother-in-law, made comments to both Giannone and Lincoln suggesting that Complainant was not going to return to work. These comments were made within a week after Complainant had her baby and continued throughout the period of her absence. (Tr. 132-34, 176-78, 182, 219-20, 234-35)

15. Upon inquiry, Gordon advised Lincoln that Complainant had changed her home phone number, and that he could not give Lincoln Complainant's new phone number. (Tr. 220-21)

16. At the end of May 2005, Giannone concluded that Complainant was not going to return to work, and had abandoned her job. Giannone then placed an advertisement seeking a new receptionist. (Tr. 148, 162, 184)

17. On June 10, 2005, Complainant called Respondent to inform them that she wished to return to work on June 20, 2005. Lincoln informed Complainant that she had been replaced because there had been no contact with them since she had given birth and they had concluded that she no longer wanted the position. (Tr. 75-76, 217-18)

OPINION AND DECISION

Complainant alleged that she was unlawfully discriminated against on the basis of her sex. Respondent denied unlawful discrimination. Because Respondent did not unlawfully discriminate against Complainant, the complaint must be dismissed.

The Human Rights Law defines an "employer" as one that "does not include fewer than four or more persons in his employ." Human Rights Law § 292.5

Respondent asserts that, while four people were employed by Respondent during the relevant time period (Giannone, Lincoln, Gordon and Complainant), Giannone's position as Respondent's principal does not make him an "employee" for jurisdictional purposes. The Division disagrees.

In *Germakian v. Kenny International Corp.*, 151 A.D.2d 342, 543 N.Y.S.2d 66 (1st Dept. 1989), the relevant portion of the Human Rights Law was construed in such a way that a principal was not generally considered to be an employee, and that an employer was defined as someone who engaged "four persons other than himself or herself." The Court, however, noted that there were instances in which principals may be counted as employees for purposes of the Human Rights Law. *Id.* at 343, 543 N.Y.S.2d at 67. One such instance is where the person who is allegedly responsible for the discriminatory act is acting on behalf of the Respondent. In those cases, "that person should be included in the jurisdictional count." *Copley v. Morality in Media, Inc.*, 1981 U.S. Dist. Lexis 10497 at *10 (S.D.N.Y. 1981).

Here, it has been alleged that Giannone was the alleged discriminatory decision-maker. Thus, Giannone should be included in the count, thus bringing the total to four. As Respondent has four or more employees, the Division has jurisdiction.

Because the Division has jurisdiction, it can and must decide the complaint. Here, the complaint fails.

Complainant has not proven that her alleged termination or separation from employment was in any way related to her sex (pregnancy). In fact, all the credible evidence established that Respondent acted consistently with an employer that wanted and expected Complainant to return to work after the birth of her baby. Complainant was aware that Respondent's employee handbook required leaves to be made in writing. Complainant left the office approximately April 14, 2005, and after doing so, had no contact with Respondent whatsoever regarding the date of her return. Respondent attempted to contact Complainant by calling her at home, but such attempts were unsuccessful. At the same time, Complainant's brother-in-law made comments to both Giannone and Lincoln suggesting that Complainant was not going to return to

work and advising them that Complainant had a new telephone number, which he could not share. Respondent waited more than two months before hiring a replacement for Complainant. And, the record makes clear that Complainant's co-worker, Lincoln, was pregnant at the time that Giannone hired her and she has worked for him since that time. In sum, there is no evidence supporting Complainant's charge that she was discriminated against based on her sex, and the complaint is hereby dismissed.

ORDER

Pursuant to 9 NYCRR § 465.17(c)(3), Adjudication Counsel Matthew Menes has been designated by Commissioner Kumiki Gibson to issue this Final Order. The Adjudication Counsel has not taken any part in the prior proceedings with respect to this case.

On the basis of the foregoing Findings of Fact, Opinion and Decision, and the laws applicable to this case, it is hereby

ORDERED, that the complaint be, and hereby is, DISMISSED.

DATED: December 17, 2007
Bronx, New York

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MATTHEW MENES
Adjudication Counsel