ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MEGAN RENEE JOCK,

Complainant,

v.

FASTRAC MARKETS, LLC,

Respondent.

Federal Charge No. 16GB102616

NOTICE AND FINAL ORDER

Case No. 10147787

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 March 6, 2013, 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: 4/11/2013
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10147787**

SUMMARY

Complainant alleged that Respondent transferred her, demoted her, and reduced her work hours because of her pregnancy and related medical conditions. Because the evidence does not support Complainant's allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 30, 2011, 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. Public hearing sessions were held on August 8 and 9, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Robert C. Whitaker, Jr., Esq.

After the hearing, the case was reassigned to Edward Luban, another ALJ of the Division.

FINDINGS OF FACT

1. Complainant is female. (Tr. 13)

2. In January 2010, Complainant began working as a third assistant manager ("3A") on the overnight shift at Respondent's gas station and convenience store in Mexico, New York ("Mexico store"). Complainant's pay rate was $8.50 per hour. (Tr. 13-15)

3. Sharon Gibson was manager of the Mexico store in 2010. (Tr. 25, 110, 363-64)

4. In 2010, all shifts in the Mexico store were single shifts. Only one employee worked each shift, except for occasional overlapping at the beginning and end of shifts. (Tr. 14-15, 298-99, 365)

5. Respondent's employees who are classified as manager and first, second, and third assistant manager ("1A," "2A," "3A") have set schedules. Employees classified as fourth assistant manager ("4A") work the leftover hours when needed. 4As do not work single shifts. (Tr. 258, 271)

6. Full-time 4As work at least 38 hours per week. Respondent schedules full-time 4As first and gives the remaining hours to part-time 4As. (Tr. 274, 307, 312-13)

7. Complainant received an employee handbook when she was hired. The handbook included antidiscrimination policies and internal complaint procedures. (Tr. 18, 102, 105, 329-32; Respondent's Exh. 18)

8. Mary Taylor is a district supervisor for Respondent. In 2010, Taylor was responsible for Respondent's stores in Mexico, Oswego, Rome, Watertown, Lowville, and Old Forge, New York. (Tr. 253, 287-88)

9. Complainant was aware that she could go to Taylor if she had a problem with her manager. (Tr. 105)

10. Respondent posts the home and cell telephone numbers of district supervisors and its management team, including Dave Hogan, vice-president of human resources, in all its stores for the employees to contact them. (Tr. 127-28, 305-06, 328, 332-33, 391-92)

11. Complainant's duties in the Mexico store included restocking milk and beer, connecting soda to the fountain machine, making pizza, mopping and cleaning, and assisting customers. (Tr. 14-15, 97-98, 100-01, 299-300)

12. Complainant had to regularly lift and move up to 10 pounds and occasionally lift and move as much as 55 pounds. The items she had to lift and move included bags of ice, cases of beer, crates of milk, boxes of soda syrup, and boxes of frozen pizza dough. (Tr. 16-18, 101, 389-91; Respondent's Exh. 1)

13. On April 12, 2010, Complainant transferred to Respondent's store in Oswego ("Oswego store"), where she had similar duties. (Tr. 20; Respondent's Exh. 14)

14. Katelynne Bryan was the manager of the Oswego store. (Tr. 23, 250)

15. Complainant and Bryan went to high school together and were formerly very good friends. Bryan was a maid of honor at Complainant's wedding. Their relationship has been "on and off" over the years. (Tr. 117, 242-43, 251-52)

16. On August 30, 2010, Complainant transferred back to the Mexico store as a 2A. Complainant worked 48 hours per week on the overnight shift. Her pay rate increased to $8.75 per hour. (Tr. 24, 26, 27, 34, 90, 289; Respondent's Exh. 14)

17. On September 8 or 9, 2010, Complainant was injured in an automobile accident. Complainant was treated at University Hospital, where she was advised to remain out of work for three days. (Tr. 28, 110, 123)

18. After the accident, Complainant's vehicle was no longer drivable. Complainant and her husband had to share one vehicle. (Tr. 182-83)

19. Complainant called Gibson to tell her that she would not be at work because of the accident. (Tr. 365)

20. While she was in the hospital, Complainant learned that she was pregnant. (Tr. 29)

21. In a subsequent telephone call, Complainant told Gibson that she was pregnant and that the hospital was putting her on light duty. (Tr. 366)

22. On September 10, 2010, Catherine Tambroni-Parker, C.N.M. of Oswego County OB-GYN, P.C. reported that Complainant was seven weeks pregnant. Tambroni-Parker noted that Complainant "should work no more than 8 [sic] per day and 5 shifts per week . . . (and) should refrain from lifting more than 25 pounds." (Respondent's Exh. 5)

23. The same day, Tambroni-Parker's note was faxed to Respondent's corporate office in Syracuse. Taylor received the note by e-mail on September 12, 2010. (Tr. 289-91, 321; Respondent's Exh. 5)

24. Respondent could not accommodate Complainant's medical restrictions at the Mexico store because her duties required her to lift items that weighed more than 25 pounds. Because all shifts at the Mexico store were single shifts, no other employees would be available to assist Complainant with these tasks. In addition, because she was the only employee on duty, Complainant would have had to work more than eight hours if the employee for the next shift was late or called in sick. (Tr. 298-301)

25. Respondent has a long-standing policy that employees who are restricted to lifting 25 pounds cannot work alone. This policy is not limited to pregnant employees. (Tr. 391)

26. On September 13, 2010, Taylor met Complainant at the Mexico store to discuss Complainant's medical restrictions. Taylor told Complainant that she could not work at the Mexico store but could return to the Oswego store as a 4A, where she would not work alone and would have more flexibility. (Tr. 291-93, 301, 368-69)

27. The Oswego store was closer to Complainant's home than the Mexico store. (Tr. 142)

28. At the time, the Oswego store had no open 1A, 2A, or 3A positions. The only open position was the 4A. (Tr. 302, 336)

29. Complainant accepted the transfer to the Oswego store as a full-time 4A. (Tr. 31, 251, 307)

30. When Respondent transferred Complainant to the Oswego store, her pay rate was supposed to remain the same. (Tr. 303, 337; Respondent's Exh. 14)

31. After Complainant's employment ended, Respondent's management learned that her pay rate had been reduced by 25 cents an hour when she transferred to the Oswego store. This reduction was made in error. (Tr. 303, 316, 337)

32. Complainant never told Bryan, Taylor, Hogan, or Tom Wright, vice-president of operations, about the reduction in her pay rate. Had she done so, Respondent would have corrected the error and would have paid Complainant the money she lost because of the reduction. (Tr. 148, 303, 337)

33. Bryan did not have authority to reduce Complainant's pay rate, and she was not involved in the reduction. (Tr. 304-05, 337-38)

34. Respondent has a merchandise bonus program, under which bonuses are payable to employees whose stores achieve set sales goals in specified target areas. Only store managers and 1As, 2As, and 3As are eligible for bonuses; 4As are not. (Tr. 148-49, 304, 341; Respondent's Exh. 19, pp. 22-23)

35. After Complainant transferred to the Oswego store and became a 4A, she was no longer eligible for the merchandise bonus. (Tr. 149, 304, 341)

36. Complainant did not have a regular schedule in the Oswego store. Her hours varied based on Respondent's needs. (Tr. 147)

37. Complainant acknowledged that from the time she returned to the Oswego store until mid-October 2010, Bryan scheduled her for almost 40 hours per week. (Tr. 41, 49-50, 135, 153, 254)

38. Effective October 11, 2010, pursuant to a request from Complainant to Taylor, Complainant became a part-time 4A. Complainant's pay rate did not change. (Tr. 307-08, 310-11, 342; Respondent's Exhs. 15, 20)

39. In her request, Complainant mentioned transportation problems, the expense of insurance, and needing fewer hours so she could keep medical appointments. (Tr. 311)

40. Before Complainant switched to part-time status, she and her husband were covered by health insurance provided by Respondent. Complainant paid a "hefty amount" in monthly premiums for this insurance. (Tr. 176, 179-80, 348; Respondent's Exhs. 21, 22)

41. After Complainant's health insurance coverage ended, Complainant received coverage through "PCAP." I take official notice that PCAP, the Prenatal Care Assistance Program, is a New York State Medicaid program for pregnant women and their babies. Complainant did not have to pay a premium for PCAP. (Tr. 176-78)

42. Complainant had previously told Bryan that if she became a part-time employee she could obtain PCAP coverage and would not have insurance premiums deducted from her paycheck. (Tr. 273-74)

43. Complainant did not complain to Hogan that her health insurance coverage ended. (Tr. 349)

44. From October 14 to November 12, 2010 and from December 15, 2010 on, Complainant was out of work because of complications to her pregnancy, including sciatica, a "GI virus," and injuries sustained in a fall. (Tr. 50-51, 69-71, 144-45, 155-56, 165; Joint Exhs. 2-8)

45. Complainant was scheduled to work 34 hours during the week ending November 21, 2010, 19 hours during the week ending November 28, 2010, and 14 hours each week during the weeks ending December 5 and 12, 2010. (Tr. 170, 173; Respondent's Exhs. 6, 17)

46. Complainant asked Bryan for more hours. Bryan told Complainant that she could not give her more hours because all she had available were single shifts. Complainant's medical restrictions did not permit her to work alone. (Tr. 254, 257, 263)

47. Bryan expressed annoyance that Complainant had medical restrictions and missed so much work. Bryan said she did not have such restrictions when she was pregnant. (Tr. 52, 72-73, 239)

48. Bryan also told Complainant that she would get more hours if her restrictions were lifted. (Tr. 49)

49. On November 22, 2010, Complainant began working at the Dollar Tree store in Fulton, New York. (Tr. 183; Respondent's Exh. 25)

50. Around December 22, 2010, Complainant sent Bryan a text message that she was quitting her job. Neither Complainant nor Respondent produced a copy of the text message. In her message, Complainant mentioned transportation problems. She did not mention discrimination. (Tr. 74-75, 185, 186-87, 261, 314; Respondent's Exh. 16)

51. Complainant testified that part of the reason she quit working for Respondent was that she was getting more hours from Dollar Tree. (Tr. 185)

52. During her employment with Respondent, Complainant did not complain that Bryan or anyone else harassed her, discriminated against her because she was pregnant, or discriminated against her because she had medical restrictions. (Tr. 254, 306, 357, 386, 392)

53. Complainant told Taylor that Bryan gave her days off only on weekends when she needed weekdays off for medical appointments, but she did not complain about discrimination or harassment. (Tr. 84, 86, 136)

54. Complainant told Gibson that Bryan was "being a bitch" to her. In Gibson's experience, Bryan was "like that with all her employees." Complainant did not complain to Gibson that Bryan was treating her differently because of her pregnancy. (Tr. 79, 219-20, 369, 372-73)

55. Taylor, not Bryan, made the decision to transfer Complainant to the Oswego store, made all final scheduling decisions, and approved Complainant becoming a part-time employee. (Tr. 253, 304, 312-13, 367)

56. Complainant testified that she did not believe that Taylor, Hogan, or Wright had discriminated against her because she was pregnant or had medical restrictions. (Tr. 114-16)

57. On February 1, 2011, Hogan wrote Complainant and offered to reinstate her to a part-time position in Respondent's Fulton store, closer to Complainant's home. Hogan's letter was sent by certified mail. (Tr. 354; Respondent's Exh. 8)

58. Complainant did not receive Hogan's letter. The letter was returned to Respondent as unclaimed. (Tr. 191; Respondent's Exh. 2, pp. 20, 29, Respondent's Exh. 8)

59. Hogan made his offer well before Complainant filed her Division complaint. Complainant did not learn of the offer until April 1, 2011, after she filed her complaint. (Tr. 191-92, 196)

60. Mazie Czuprynski has worked at Respondent's Oswego store since July 2010. Bryan was Czuprynski's manager in 2010. (Tr. 376-77)

61. In September 2010, Czuprynski became pregnant. She informed Bryan of her pregnancy almost immediately. Bryan did not reduce Czuprynski's hours, discriminate against her, or otherwise treat her differently after she became pregnant. (Tr. 314, 378, 379-80)

OPINION AND DECISION

Pregnancy and Disability Discrimination

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).

It is also an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of disability. Human Rights Law § 296.1(a). A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y. 2d 213, 219, 491 N.Y.S. 2d 106, 109 (1985).

Complainant may establish a prima facie case of discrimination by demonstrating 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. *Ferrante v. American Lung Association,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). If Complainant makes out a prima facie case of discrimination, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its actions. If Respondent does so, Complainant must show that the reason presented was merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant, who was a pregnant woman with medically diagnosed impairments, is a member of several protected classes. Complainant was qualified for her position with Respondent. After Complainant informed Respondent of her pregnancy and medical restrictions,

Respondent transferred her to a lower grade position in the Oswego store and reduced her pay rate. After her transfer, Complainant was no longer eligible for the merchandise bonus program. When Complainant returned to work after a one-month absence for medical reasons, Respondent scheduled her for fewer hours. These circumstances are 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 legitimate, non-discriminatory reasons for its actions. Respondent could not accommodate Complainant's medical restrictions in the Mexico store, where all employees worked single shifts. Respondent has a long-standing policy, not limited to pregnant employees, that employees who cannot lift more than 25 pounds may not work alone. Accordingly, it transferred Complainant to the only open position in the Oswego store, a 4A, where Complainant would not work alone. The pay reduction Complainant experienced after her transfer was an error. Complainant did not report the reduction, and Respondent was unaware of it until after Complainant left its employ. Had Respondent known of the reduction, it would have corrected the error and paid Complainant the money she lost. Complainant became ineligible for the merchandise bonus program because 4As are not part of that program, not for any reasons related to her pregnancy or medical condition.

For approximately the first month after Complainant was transferred to the Oswego store, Bryan scheduled her to work almost 40 hours per week. After Complainant's return from a subsequent medical leave, she was scheduled for fewer hours. Respondent did not have more hours available for Complainant because she could not work single shifts. In addition, at Complainant's request, she had changed to part-time status. By becoming a part-time employee, Complainant became eligible for a Medicaid program for which she paid no premiums. She no longer had "hefty" premiums deducted from her paycheck for the coverage Respondent

provided.

Complainant failed to show that Respondent's explanations for its actions were a pretext for unlawful discrimination. Complainant acknowledged that she did not believe that Taylor, Hogan, or Wright had discriminatory animus toward her. The only person who Complainant alleged had discriminatory animus was Bryan. Yet the relevant decisions that affected Complainant's employment were made by Taylor, not Bryan. While Bryan expressed frustration and annoyance at Complainant's restrictions, there is no evidence that she was motivated by discriminatory animus. Bryan and Complainant had a long-standing relationship that had ups and downs. In addition, according to Gibson, Bryan's treatment of Complainant was similar to her treatment of other employees.

Complainant never complained about discriminatory treatment. When she quit her employment by sending a text message to Bryan, she mentioned only transportation problems, not discrimination. In February 2011, two months after Complainant quit and well before she filed her Division complaint, Respondent offered to reinstate Complainant to a position in its Fulton store, which was closer to Complainant's home and would have alleviated the transportation difficulties she cited when she quit the Oswego store.

Complainant has the ultimate burden of proof to establish that Respondent's actions constituted unlawful discrimination. *Ferrante* at 630, 665 N.Y.S.2d at 29. Complainant has failed to meet this burden.

Reasonable Accommodation

The Human Rights Law requires an employer to provide a reasonable accommodation for an employee's known disability. Human Rights Law § 296.3 (a). Once the need for accommodation is known or requested, the employee and the employer are required to engage in

an interactive process, which includes the discussion and exchange of pertinent medical information, to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 148-49, 811 N.Y.S.2d 381, 387 (1st Dept. 2006), *lv. to appeal den.*, 7 N.Y.3d 707, 821 N.Y.S.2d 813 (2006); *Vinikoff v. New York State Div. of Human Rights*, 83 A.D.3d 1159, 1162, 920 N.Y.S.2d 458, 461 (3d Dept. 2011); 9 N.Y.C.R.R. §§ 466.11 (j), (k).

Complainant's medical provider notified Respondent that she was pregnant and had medical restrictions. Respondent could not accommodate these restrictions in its Mexico store, where Complainant worked. Accordingly, Respondent transferred Complainant to the only open position in the Oswego store, which could accommodate her restrictions and was closer to her home. Respondent continued to accommodate Complainant when she was unable to work for medical reasons. Complainant was out of work approximately one month, then returned and went back on the weekly schedule. Other than requesting more hours, which Respondent could not provide because of her restrictions, Complainant has not shown that she requested any accommodations that Respondent failed to provide.

In light of the evidence presented, Complainant failed to meet her burden of showing that Respondent denied her a reasonable accommodation.

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: March 6, 2013
Syracuse, New York

Edward Luban
Administrative Law Judge