NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **MANDY MARZILIANO,** Complainant, v. **BWD GROUP, LLC,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10106617

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 June 10, 2009, by Robert M. Vespoli, 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:
Bronx, New York
SEP 18 2009

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MANDY MARZILIANO,

Complainant,

v.

BWD GROUP, LLC,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10106617**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her pregnancy and pregnancy related morning sickness by demoting her and terminating her employment. Complainant also alleged that Respondent retaliated against her for opposing discriminatory practices. Since the record does not support Complainant's allegations of discrimination and retaliation, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On June 20, 2005, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 11 and 12, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Robert Ziskin, Esq. and Suzanne Ziskin, Esq. Respondent was represented by Mark Mancher, Esq. and Ana Shields, Esq.

At the close of the public hearing, Complainant moved to continue the hearing to accommodate the testimony of her physician, Dr. Michael Polcino. (Tr. 466-67) The presiding ALJ denied this application and closed the evidentiary record on February 12, 2008. However, the presiding ALJ granted Complainant leave to submit an affidavit from Dr. Polcino into the record no later than February 19, 2008. (Tr. 494-96, 502-05)

On February 19, 2008, Complainant submitted a facsimile copy of an affidavit from Dr. Polcino that was not notarized. This document was received into evidence as Complainant's Exhibit 22. (Tr. 505)

On February 15, 2008, Complainant proffered an affidavit from Susan Ginexi into the hearing record. Complainant did not attempt to call Ginexi as a witness or to proffer information from Ginexi in any other form during the designated hearing dates. Since the presiding ALJ closed the evidentiary record on February 12, 2008, with the sole exception of Dr. Polcino's affidavit, the presiding ALJ did not receive this document into evidence.

On May 23, 2008, the presiding ALJ issued a Recommended Findings of Fact, Opinion and Decision, and Order recommending dismissal of the instant case.

On October 6, 2008, the Commissioner, *sua sponte*, reopened the hearing record and returned this matter to the presiding ALJ to allow Complainant to present testimony from Ginexi

and Dr. Polcino. (ALJ's Exh. 7) Accordingly, a public hearing session was held on February 11, 2009. Complainant and Respondent appeared at the hearing. Complainant was represented by Richard Ziskin, Esq. and Suzanne Ziskin, Esq. Respondent was represented by Mark Mancher, Esq. and Ana Shields, Esq.

The parties filed timely post-hearing briefs.

FINDINGS OF FACT

1. Respondent hired Complainant on July 8, 2002, to work as an assistant account executive trainee. (Tr. 8)

2. Complainant became pregnant in or about May 2004 and notified Respondent about her pregnancy on or about June 16, 2004. (Tr. 9)

3. During the relevant time period, Respondent has employed many women who became pregnant, went out on leave and returned to work. (Tr. 312-13, 433-36; Respondent's Exh. 10)

4. At the time of her effective discharge on December 24, 2004, Complainant's job title was assistant account executive in Respondent's Commercial Lines Department. (Tr. 8-9, 62)

5. As an assistant account executive, Complainant provided office support services to the account executive. (Tr. 317; Complainant's Exh. 6)

6. During the relevant time period, Complainant was assigned to work for Account Executive Susan Ginexi. (Tr. 42-43, 320, 519) As an account executive, Ginexi was responsible for servicing a book of business. (Tr. 313, 519; Respondent's Exh. 6) The account executive position required at least five years of experience in an analogous position. (Respondent's Exh. 6)

7. Complainant's direct supervisor was Joseph Bergamini, Respondent's commercial lines supervisor during the relevant time period. (Tr. 50, 364-66)

8. Complainant's work hours were 8:45 a.m. to 4:45 p.m. (Tr. 63, 533)

9. Shortly after Complainant notified Respondent that she was pregnant, Complainant exhibited attendance deficiencies on a consistent basis. (Tr. 66-67, 339, 399; Complainant's Exh. 19) On some occasions, Complainant came to work fifteen to thirty minutes late. On other occasions, she came to work more than one hour late. (Tr. 67, 375; Complainant's Exh. 19)

10. Complainant informed Respondent that the reason for her attendance deficiencies was pregnancy related morning sickness. (Tr. 66-67, 319, 339, 367, 522-24) Respondent did not implement disciplinary action against Complainant as a result of her attendance problems. (Tr. 175-76, 400)

11. Respondent's expert witness, Dr. Shari Lusskin, testified that she reviewed Complainant's medical records from Complainant's treating obstetrician/gynecologist ("OB/GYN"). (Tr. 476-77) The only mention of symptoms related to morning sickness occurred on July 28, 2004, when Complainant told her OB/GYN that she experienced "a little nausea, but not bad." (Tr. 481; Respondent's Exh. 12) Dr. Lusskin testified that Complainant's pregnancy appeared to be normal in all respects, except for her complaints of anxiety which first appeared on October 4, 2004. (Tr. 477)

12. Complainant's OB/GYN, Dr. Michael Polcino, reviewed Complainant's medical records, and he could not conclude that Complainant suffered from morning sickness. (Tr. 560)

13. Bergamini and Paul Costantino, Respondent's commercial lines manager, testified that Ginexi complained that Complainant's attendance problems caused Ginexi to feel overworked and adversely affected Ginexi's ability to do her job. (Tr. 311, 320-22, 341-42, 368-70) While

Ginexi felt that Complainant was a good worker, Ginexi also felt "overwhelmed" with her responsibilities and felt that Respondent did not have enough support staff. (Tr. 321-22, 520, 526-27, 536, 538-39, 542)

14. Respondent was forced to rotate other assistant account executives to help Ginexi while Complainant was not at work. (Tr. 342-43, 367-68, 531, 536) This meant that the assistant account executive assigned to assist Ginexi while Complainant was out often had to be taken away from another account executive. (Tr. 368, 536) Elisa Aquino, an assistant account executive, had frequently been called upon to assist Ginexi in Complainant's absence. (Tr. 322, 343-44, 540)

15. When Complainant was hired, Respondent provided her with an employee handbook containing Respondent's Family and Medical Leave Act ("FMLA") and non-FMLA leave policies. (Tr. 141; Complainant's Exh. 1) Additionally, Mary Macedonia, Respondent's vice president of human resources, met with Complainant on August 11, 2004, to discuss Respondent's applicable FMLA and non-FMLA leave policies. (Tr. 68-69, 389, 390-93) Macedonia provided Complainant with a customary packet of materials that included information and forms related to these leave policies. (Tr. 69, 77, 390-92; Complainant's Exh. 9)

16. These leave policies stated that Complainant was entitled to twelve weeks of FMLA leave, and she could seek additional non-FMLA disability leave so long as she submitted specific medical information to Respondent in support of this request. Complainant was required to maintain regular contact with Respondent regarding her condition and her intention to return to work. She was also obligated to provide notice to Respondent one week prior to the date she intended to return to work. These policies further advised Complainant that engaging in other

employment while on such leave would be considered voluntary resignation of her employment with Respondent. (Tr. 391-94; Complainant's Exh. 1)

17. Complainant's attendance problems continued into September 2004. (Tr. 321-22, 372) Aquino was reassigned to another account executive at that time and was less available to assist Ginexi when Complainant was not at the office. (Tr. 322-23, 343-44, 540-41)

18. In September 2004, Bergamini, Costantino, Richard Wigginton, Respondent's senior vice president of commercial lines, and Macedonia met to resolve the situation. (Tr. 322-23, 371-72, 402) A consensus was reached wherein Respondent would temporarily transfer Complainant to an open senior clerical position, where her official title, salary and benefits would remain unchanged. (Tr. 325-27, 333, 372-73, 402-06) In the senior clerical position, Complainant's attendance problems could be more easily absorbed without detriment to the functioning of the department. (Tr. 327-32, 372) Ginexi would then be assigned an assistant account executive who had just become available. (Tr. 325-27, 402-03)

19. On October 1, 2004, Bergamini, Costantino and Macedonia met with Complainant to explain this proposed transfer. (Tr. 85-87, 329-30, 372, 407) Complainant became upset at this meeting because she felt that she was being demoted because of her pregnancy. (Tr. 87, 93) Complainant asked Respondent to change her work hours to 10:00 a.m. to 6:00 p.m. in lieu of the proposed transfer. (Tr. 88-89) However, Respondent's management determined that Ginexi needed an assistant at work by 8:45 a.m. (Tr. 328, 331-32)

20. Although Respondent averred that Complainant was told this would only be a temporary transfer, Complainant denied this assertion. (Tr. 88, 330, 407) Complainant left the meeting before it ended and went home upset. (Tr. 93, 171, 333) This was the last day that Complainant worked for Respondent. (Complainant's Exh. 19)

21. Complainant submitted a doctor's note dated October 4, 2004, stating that she needed bed rest and could not return to work until October 18, 2004, due to emotional distress. (Tr. 95; Complainant's Exh. 11)

22. Macedonia called Complainant on October 6, 2004. (Tr. 97, 409) Macedonia assured Complainant that her job responsibilities in the senior clerical position would not be strenuous, and Complainant would continue doing some of the same tasks she was doing before. (Tr. 410) Macedonia reiterated to Complainant that this transfer was temporary and that Complainant would return to the account executive position or an equivalent position upon her return from maternity leave. (Tr. 410-11) Later that day, Macedonia sent Complainant another packet of materials that included information and forms regarding Respondent's leave policies. (Tr. 411; Respondent's Exh. 7)

23. On October 11, 2004, Complainant began a one week, forty-five hour real estate course in order to become a real estate salesperson. (Tr. 180-81) She received her certificate of completion for this course on October 18, 2004. (Respondent's Exh. 1)

24. Complainant did not come back to work for Respondent on October 18. (Tr. 414) On this date, she applied for her license as a real estate salesperson under the sponsorship of a local real estate agency. (Complainant's Exh. 20)

25. Complainant remained out of work, and on October 26, 2004, Complainant submitted completed FMLA leave documents to Respondent stating that she could not return to work because her pregnancy was complicated by anxiety and stress. (Complainant's Exh. 14) Complainant testified that she could not return to work for Respondent because she felt "degraded and embarrassed." (Tr. 187)

26. Complainant passed her real estate examination, and on November 30, 2004, she placed her license with the sponsoring real estate agency and began working as a real estate salesperson. (Tr. 189-91)

27. Complainant's FMLA leave was scheduled to expire on December 24, 2004, twelve weeks after she went out on leave beginning October 1, 2004. (Complainant's Exh. 14) Complainant did not contact Respondent prior to the expiration of her FMLA leave. (Tr. 191-92)

28. On December 15, 2004, Macedonia mailed a letter to Complainant specifying the December 24 FMLA leave expiration date along with another packet of materials that included information and forms related to Respondent's non-FMLA disability leave policy. (Tr. 420-25; Respondent's Exh. 9) Complainant testified that she did not receive this letter and its attachments in December 2004. (Tr. 113; Complainant's Exh. 15)

29. Having received no communication from Complainant since October 25, 2004, and having received no reply to the December 15 letter and its attachments, Macedonia concluded that Complainant did not intend to return to work. (Tr. 426-27) By letter dated January 4, 2005, Macedonia informed Complainant that her employment was terminated effective December 24, 2004. (Tr. 8, 114, 427; Complainant's Exh. 16)

30. Complainant also charged that Respondent retaliated against her by terminating her employment after her attorney contacted Respondent's attorney and stated that Complainant may file a discrimination complaint. (ALJ's Exhibits 1, 2) However, there is nothing in the record substantiating this claim.

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of gender or disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production shifts to Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

As a pregnant female, Complainant is a member of a protected class. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). Complainant informed Respondent about her pregnancy on or about June 16, 2004.

Furthermore, pregnancy related morning sickness qualifies as a disability under the Human Rights Law. A disability is defined under the Human Rights Law as "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 disability may also be 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).

The record does not establish that Complainant was medically diagnosed with pregnancy related morning sickness. After reviewing Complainant's medical records, neither Complainant's OB/GYN nor Respondent's expert witness could confirm such a diagnosis.

However, shortly after announcing her pregnancy, Complainant informed Respondent that the reason for her attendance deficiencies was pregnancy related morning sickness. The record establishes that Respondent perceived that Complainant suffered from pregnancy related morning sickness in or about June 2004. *See Ashker v. Int'l Bus. Machines Corp.*, 168 A.D.2d 724, 726, 563 N.Y.S.2d 572, 574 (3d Dept. 1990) (stating that "nondisabled individuals" are protected by the Human Rights Law when an employer incorrectly perceives them as having a covered disability).

Under the Human Rights Law, an employer is obligated to provide reasonable accommodations for an employee's known disabilities. Human Rights Law § 296.3. Respondent did not take disciplinary action against Complainant for her attendance deficiencies. Respondent accommodated Complainant by rotating other assistant account executives, who often had to be taken away from other account executives, to fill in for Complainant while she was not at work. However, Respondent was unable to continue this accommodation in September 2004 when Aquino was reassigned. At that time, Respondent proposed a new accommodation in the form of a temporary transfer to an open senior clerical position.

Complainant asked Respondent to change her work hours to 10:00 a.m. to 6:00 p.m. in lieu of the proposed transfer. However, this was not feasible because Respondent's management determined that Ginexi needed her assistant at work much earlier in the morning. It is well-settled that Respondent "has the right to select which reasonable accommodation will be

provided, so long as it is effective in meeting the need." 9 N.Y.C.R.R. § 466.11(j)(6).

Complainant's claim that the proposed transfer was a permanent demotion to a more physically demanding position is speculative and conclusory. Complainant did not work a single day for Respondent after this transfer was proposed to her. Respondent presented credible evidence that this transfer was temporary, that Complainant's job would not be strenuous and that her official title, salary and benefits would remain unchanged. The record establishes that Respondent proposed this transfer to an available position as a reasonable, temporary accommodation for Complainant. *See* 9 N.Y.C.R.R. § 466.11(i)(3).

Furthermore, Complainant did not establish that she was qualified to be promoted to an account executive position.

Although termination of employment is clearly an adverse employment action, Complainant did not show that her discharge was causally related to her disabilities or perceived disabilities. *See McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994). The record does not establish that Respondent acted with discriminatory animus when it terminated Complainant's employment. However, Complainant "can indirectly establish a causal connection to support a discrimination or retaliation claim by showing that the protected activity was closely followed in time by the adverse [employment] action." *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (citations and internal quotation marks omitted). In the instant case, Complainant's employment was terminated approximately six months after Complainant informed Respondent that she was pregnant and suffering from pregnancy related morning sickness. Without any additional evidence of causation, this temporal relationship is too remote to establish causation. *See id.*

Even if Complainant successfully established a prima facie case of discrimination,

Respondent has shown that its actions were motivated by legitimate, nondiscriminatory reasons. Respondent established that, during the relevant time period, it has employed many women who became pregnant, went out on leave and returned to work.

Moreover, Complainant was aware of Respondent's FMLA and non-FMLA leave policies at all relevant times but did not comply with these policies. She did not maintain regular contact with Respondent regarding her condition and her intention to return to work. She also failed to submit specific medical information to Respondent in support of a request for non-FMLA disability leave. Instead, Complainant embarked on a career as a real estate salesperson almost immediately after she went out on FMLA leave, a clear violation of Respondent's established policies.

Complainant's failure to follow Respondent's established leave policies is sufficient justification for the termination of her employment. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 307, 786 N.Y.S.2d 382, 392 (2004).

The burden then shifts back to Complainant to show that this reason is a pretext for unlawful discrimination. Complainant has failed to meet her burden.

Although Complainant also claimed that Respondent terminated her employment because she opposed discriminatory practices, the record is devoid of evidence substantiating this claim. Accordingly, Complainant's retaliation claim must also be dismissed.

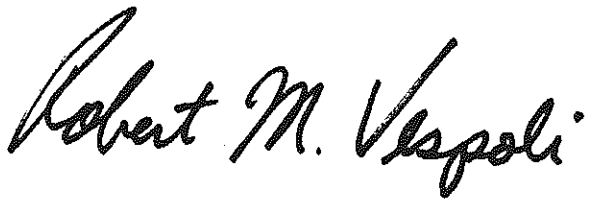
The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to establish that she was the subject of retaliation or that Respondent treated her in an unlawful manner because of her gender, disabilities or perceived disabilities.

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 instant complaint be, and the same hereby is, dismissed.

DATED: June 10, 2009
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge