ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ALICE MCNALLY,

Complainant,

v.

PRIDE PRODUCTS CORPORATION,

Respondent.

Federal Charge No. 16GB104194

NOTICE AND FINAL ORDER

Case No. 10150060

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 October 24, 2012, 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: 1/30/2013
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
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ALICE MCNALLY,

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PRIDE PRODUCTS CORPORATION,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10150060**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against her because of her status as a pregnant female by denying her health insurance coverage and terminating her employment. Because the record does not support Complainant's allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 31, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 25 and 26, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Joseph A. Hyland, Esq. Respondent was represented by Maurizio Savoiardo, Esq.

Complainant and Respondent filed timely proposed findings of fact and conclusions of law which were considered and, where appropriate, adopted.

FINDINGS OF FACT

1. Respondent is a distributor of products that include health and beauty aids, accessories, food products, candy, snacks, hardware, paper goods, and plastic goods. (Tr. 401)

2. Respondent purchases both domestic and imported products for distribution. (Tr. 401)

3. In 2004, Complainant began working for Respondent as a sales representative. Respondent paid Complainant on a strict commission basis. (Tr. 11)

4. Greg McNally ("Greg"), Complainant's husband, was employed by Respondent as a vice-president. Greg was the head of Respondent's domestic purchasing department until February 11, 2011. (Tr. 10, 119-21, 201, 401)

5. David Emrani, Respondent's president, chief executive officer ("CEO"), and owner, was the head of Respondent's import purchasing department. (Tr. 400-01) Emrani's assistant, Janey Qian, worked with Emrani on the import purchasing side of the business. (Tr. 47, 401)

6. In March 2007, around the time of the birth of her third child, Complainant was out of work on maternity leave for approximately two months. (Tr. 12-13, 80-82)

7. When Complainant returned to work, she asked Emrani if she could work from home on a part-time basis so she could care for her three children. (Tr. 80-82, 88)

8. Emrani granted Complainant's request. Respondent paid for the installation of equipment in Complainant's home which allowed her to access Respondent's computer system and work from home. (Tr. 81, 85)

9. Complainant continued to work from home for two-and-a-half years. (Tr. 81, 88)

10. In or about June 2009, Complainant returned to work at Respondent's office on a part-time basis. (Tr. 14-15, 82, 494-96)

11. Beginning in 2008, Respondent's revenues began to steadily decline. In 2008, Respondent's total revenues dropped by almost $2,000,000.00. (Tr. 365-66; Respondent's Exh. 15)

12. In 2009, Respondent's total revenues decreased by $441,146.00. (Tr. 366; Respondent's Exh. 15)

13. In early 2010, Emrani reduced his weekly salary from $3,000.00 to $2,000.00, and Respondent discharged ten warehouse workers in order to reduce operating expenses. (Tr. 352-54, 360; Respondent's Exh. 13)

14. In 2010, Respondent's total revenues fell by $621,299.00. (Tr. 366; Respondent's Exh. 15)

15. On January 21, 2011, Complainant informed Emrani that she was pregnant. (Tr. 35, 121)

16. Prior to January 21, 2011, Emrani and his wife Roya Emrani ("Roya"), Respondent's treasurer, discussed the financial issues facing the company after another significant loss in

revenues for the previous year. At that time, they discussed the need to either cut back on employee salaries and benefits or to discharge more employees. (Tr. 354-56, 402, 405)

17. Emrani also discussed these issues with Heather Chamberlin, Respondent's office manager and sales coordinator, prior to January 21, 2011. (Tr. 493, 499-500)

18. Complainant acknowledged that, prior to January 21, 2011, it was common knowledge among Respondent's employees that Respondent was experiencing financial difficulties and that Respondent was going to institute additional cutbacks. (Tr. 131-32)

19. On January 21, 2011, only two hours after Complainant informed Emrani that she was pregnant, Emrani held a meeting with his entire office staff. At that meeting, Emrani informed Respondent's employees that he was going to reduce sick and vacation days for all employees and reduce the salaries of five employees. (Tr. 121-23, 133, 203, 279-80, 405-07, 500-02)

20. Emrani planned this office-wide meeting prior to January 21, 2011. (Tr. 356, 405)

21. Because Greg was one of Respondent's highest paid employees, his salary was targeted for reduction. Greg's weekly salary was reduced from $2,500.00 to $1,750.00 which was set to take effect thirty days later. (Tr. 38-39, 202-03, 282, 363-64)

22. Emrani again reduced his weekly salary from $2,000.00 to $1,750.00 which was set take effect on January 26, 2011. (Tr. 362; Respondent's Exh. 14)

23. Because of the scheduled reduction in his salary, Greg decided to leave Respondent's employ. On February 14, 2011, he began working for Harold Levinson Associates ("HLA"). (Tr. 206, 216) HLA is a large distribution company that sells a variety of different products to convenience stores. (Respondent's Exh. 10)

24. Greg's last day of work for Respondent was February 11, 2011. (Tr. 208)

25. Complainant continued to work for Respondent after Greg left. (Tr. 210-11)

26. Before Greg left Respondent's employ, Complainant sought to transfer the family health insurance coverage that was in Greg's name to her name. (Tr. 40, 370)

27. Pursuant to Respondent's health insurance contract, only full-time employees who worked thirty hours or more per week were eligible for health insurance. (Tr. 373-75; Respondent's Exh. 17)

28. From the time Complainant returned to work in 2009 until the time Respondent terminated her employment on March 11, 2011, Complainant worked roughly twenty hours per week at Respondent's office. (Tr. 46, 179-80, 496-97) She also worked, on average, approximately two hours per week from her home. (Tr. 342, 494-99)

29. After consulting with Respondent's insurance carrier, Respondent informed Complainant that she was not eligible for health insurance in her name. (Tr. 370-75)

30. Shortly after Greg began working for HLA, Complainant sought to sell Respondent's products to Greg. Complainant provided contradictory testimony on this topic, and her demeanor was evasive and insincere. (Tr. 151-53)

31. By e-mail dated February 22, 2011, Greg asked Complainant to provide him with samples of a number of imported products. (Complainant's Exh. 5) Greg did not have access to Respondent's vendors in China who were providing these products. (Tr. 153-54)

32. The products that Greg asked Complainant to provide to him were items that HLA did not sell at that time. (Tr. 414-15)

33. Greg never purchased any of the products he requested. (Tr. 415-16) This caused Emrani to become suspicious of the motives of Greg and Complainant. (Tr. 429-31)

34. Because Emrani was concerned that Complainant may have a conflict of interest, he did not want Complainant to be involved with any follow-up contact with Greg. (Tr. 431)

35. On the morning of March 11, 2011, Qian submitted her resignation to Emrani. (Tr. 416; Respondent's Exh. 5) In her letter, Qian stated that she had to resign due to "some personal reason." (Respondent's Exh. 5)

36. Emrani was very distraught, and he pleaded with Qian to continue working for Respondent at least until Emrani could obtain a qualified replacement for her. (Tr. 417)

37. When Emrani asked Qian where she was going, Qian did not respond. Emrani observed that Qian was nervous, evasive, and unresponsive to his inquiries. (Tr. 417-18)

38. When Qian returned to her desk, Emrani saw Complainant and Qian talking. (Tr. 418-19) Shortly thereafter, Emrani observed that Qian was talking on the telephone. (Tr. 422)

39. Emrani's telephone system allows him to monitor employee telephone calls. (Tr. 421-22)

40. Because he was suspicious of Qian's conduct, Emrani listened to her telephone conversation. At that time, Emrani heard Greg talking to Qian on the telephone. (Tr. 422)

41. Emrani heard Greg congratulate Qian for leaving, and he told her that Respondent "is not going to last." Emrani also heard Greg tell Qian that he will be introducing products to HLA, including imported products, which would directly compete with Respondent. (Tr. 423)

42. Emrani then summoned Qian into his office in the presence of Chamberlin. (Tr. 424) Qian gave conflicting answers to Emrani's questions and then became completely unresponsive. (Tr. 425-27)

43. At that time, Emrani formally terminated Qian's employment. (Tr. 427)

44. Emrani no longer felt that he could trust Complainant to continue working for Respondent. (Tr. 427-28) Later that evening, Emrani terminated Complainant's employment due to a "conflict of interest." (Tr. 428-29)

45. Emrani then made immediate arrangements to disconnect all access from Complainant's home computer to Respondent's computer system. (Tr. 432-33)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of sex. 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. Complainant then must show that Respondent's proffered explanations are a pretext for unlawful discrimination. *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 group. *Rainer N. Mittl, Ophthalmologist, P.C. 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 January 21, 2011. The record also establishes that Complainant was qualified for the sales representative position she held with Respondent for approximately seven years.

Complainant alleged that she suffered an adverse employment action when Respondent denied her health insurance coverage after Greg left Respondent's employ. However, the record shows that Complainant did not suffer an adverse employment action because she was not eligible for health insurance coverage. Complainant was not eligible because she was not a full-

time employee who worked thirty hours or more per week. She was a part-time employee who worked approximately twenty-two hours per week.

Complainant's argument that other similarly situated male employees were treated more favorably is untenable. Complainant provided vague, speculative, and conclusory evidence in support of this argument. This is insufficient to support her claim. *See Sharpe v. MCI Commc'ns Servs., Inc.*, 684 F. Supp. 2d 394 (S.D.N.Y. 2010).

Complainant has satisfied the third prong of the prima facie case by showing that Respondent terminated her employment.

I do not credit Complainant's claim that Emrani made derogatory remarks about Complainant's pregnancy after she informed him that she was pregnant on January 21, 2011. I note that Complainant provided some contradictory testimony during the course of the public hearing wherein she exhibited a defensive and insincere demeanor. Moreover, the record shows that Emrani was entirely supportive of Complainant's previous, third pregnancy. At that time, he fully accommodated her desire to work from home for two-and-a-half years, and he paid for the installation of equipment in Complainant's home to allow her to do so. There is nothing in this record to corroborate Complainant's claim that Emrani suddenly began to discriminate against Complainant because of her subsequent pregnancy.

The record also shows that, at the time Respondent terminated Complainant's employment, she was a part-time worker paid on a strict commission basis. Therefore, Respondent did not have a palpable financial incentive to terminate Complainant's employment.

Nevertheless, the record shows that Emrani terminated Complainant's employment on March 11, 2011, less than two months after she informed Emrani that she was pregnant. This temporal proximity is sufficient to create an inference of unlawful discriminatory discharge. *See*

Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months).

Accordingly, Complainant has met the "de minimis" burden for her to establish a prima facie case of unlawful discriminatory discharge. *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 196, 671 N.Y.S.2d 759, 761 (1st Dept. 1998).

The burden of production then shifts to Respondent to show that Complainant's discharge was motivated by legitimate, nondiscriminatory reasons. Respondent has met its burden. Respondent terminated Complainant's employment because Emrani believed that he could no longer trust Complainant because she had a conflict of interest.

Complainant has failed to show that Respondent's proffered reasons are a pretext for unlawful discrimination.

The record shows that Emrani held a sincere, reasonable belief that Complainant was a threat to his business. The Division will not second guess the wisdom or the propriety of his decision to terminate Complainant's employment so long as it was not motivated by unlawful discrimination. *Visco v. Cmty. Health Plan,* 957 F. Supp. 381, 388 (N.D.N.Y. 1997).

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *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 cannot rely on supposition and conclusory allegations to satisfy this burden. *Kelderhouse v. St. Cabrini Home*, 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999).

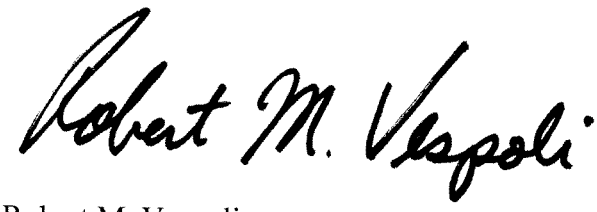
Complainant has failed to meet her burden. Accordingly, the instant complaint must be dismissed.

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

DATED: October 24, 2012
Hauppauge, New York



Robert M. Vespoli
Administrative Law Judge