NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

CAROLYN M. PASIAK,

Complainant,

v.

GEORGE BROADWELL SR., INC. D/B/A CAPTAIN'S LOUNGE,

Respondent.

NOTICE OF FINAL ORDER AFTER HEARING

Case No. 5754263

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 May 21, 2007, by Christine Marbach Kellett, 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 13th day of June, 2007.

KUMIKI GIBSON
COMMISSIONER

TO:

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STATE OF NEW YORK
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GEORGE BROADWELL, INC., D/B/A/ CAPTAIN'S LOUNGE,

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RECOMMENDED FINDINGS OF FACT, DECISION AND OPINION, AND ORDER

Case No. 5754263

STATEMENT OF THE CASE

Complainant charged Respondent with discrimination in employment when Respondent terminated her shortly after she disclosed she was pregnant. Respondent claimed economic business reasons for Complainant's termination. Although Complainant established a prima facie case of discrimination, she failed to demonstrate that Respondent's explanation was a pretext for illegal discrimination. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On July 8, 2004 Complainant filed a verified complaint with the State Division of Human Rights (Division), charging Respondent George Broadwell, Sr., Inc. d/b/a/ Captain's Lounge, with unlawful discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York.

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 Christine Marbach Kellett, an Administrative Law Judge (ALJ) of the Division. Public hearing sessions were held on December 5 and 6, 2006 and March 13, 2007.

Complainant attended the public hearing. Steven Alderman, Esq., of Mentor, Rudin & Trivelpiece, P.C. represented the Respondent. Tracy Hawthorne, Respondent's Director of Operations, attended the public hearing as Respondent's representative. Richard J. Van Coevering, Esq., a senior attorney with the Division represented the Division on behalf of the Division's General Counsel.

At the public hearing Respondent's Steven Alderman confirmed Respondent's legal identity was George Broadwell, Inc., doing business as Captain's Lounge, and the complaint was amended on the record to correctly identify the Respondent (Tr. 13-14, 481-483; Respondent's Exhibit 16).

At the conclusion of the public hearing on December 6, 2006, ALJ Kellett requested the parties provide certain additional information related to the number of employees and their hours of work and confirmation of unemployment insurance benefits (Tr. 461-465, 470-477).

The public hearing resumed on March 13, 2007, in order to give Complainant an opportunity to challenge the additional information provided by Respondent and to provide other rebuttal testimony.

Permission to file post-hearing briefs was granted. Post-hearing briefs were timely received from counsel.

FINDINGS OF FACT

1. Complainant charged Respondent violated the Human Right Law section 296 (1) when it terminated her employment in June 2004 shortly after she disclosed she was pregnant (ALJ Exhibit 1).

2. Respondent admitted it terminated Complainant's employment, and asserted that as a result of a downturn in business, Complainant as well as at least six other employees were either terminated or not replaced when they left employment (ALJ Exhibit 3).

3. Respondent has two in-hotel restaurants, Captain's Steak and Seafood Lounge ("Captain's Lounge") and G.S. Steamers, as well as catering services at Bayshore Grove ("Bayshore") in Oswego NY (Tr. 207-208).

4. Respondent employs four or more persons (Respondent's Exhibit 15).

5. Tracy Hawthorn ("Hawthorn") is Respondent's Director of Operations (Tr. 486).

6. Complainant is a female (ALJ Exhibit 1).

7. Complainant had worked for Respondent in 1988, 1990, 1992, 1995, and 2002, as bartender, server, and banquet manager at both Captain's Lounge and Bayshore (Tr. 28-32, 40-41, 213, 220).

8. In February 2004, Complainant approached Respondent about a manager's position at Captain's Lounge as the position was vacant since January 1, 2004 (Tr. 31).

9. Respondent told Complainant that Respondent was not hiring a manager because the finances would not support the position and Respondent needed to regroup (Tr. 31, 164-165).

10. Instead Respondent hired Complainant as a part-time bartender/server, with her hours fluctuating according to business needs (Tr. 49-50).

11. The manager's position at the Captain's Lounge remained vacant (Tr. 41).

12. Complainant admitted she knew the manager position was left vacant due to financial reasons (Tr. 164- 165).

13. In April 2004, the chain restaurant Ruby Tuesday's opened less than half a mile from Captain's Lounge (Tr. 351).

14. In May 2004, Complainant publicly confirmed she was pregnant and due in August to her co-workers (Tr. 51-52).

15. In June 2004, business had declined at Captain's Lounge to a significant degree as a result of both Ruby Tuesday's opening and the opening in late 2003 of two other new restaurants in the immediate vicinity (Tr. 355).

16. As a consequence of the lack of business in the catering side, Respondent cancelled Complainant's hours for a conference at Bayshore on June 16, 2004 (Tr. 58).

17. Complainant admitted she knew staffing for the catered events at Bayshore, as well as work schedules at Captain's Lounge, depended on business expectations (Tr. 58, 181-182).

18. Complainant's witness Jessica Spittle ("Spittle") confirmed that she had originally been scheduled to work with both Complainant and another employee, Nikki McManus ("McManus"), Hawthorn's niece, on June 16, 2004, at Bayshore, and that although Complainant had been sent home, she and McManus had been able to handle the bar business without stress (Tr. 261, 283). This contradicted Complainant's allegation that the Respondent was quite busy that evening (ALJ Exhibit 1).

19. On June 18, 2004, Complainant was working as bartender at the Captain's Lounge when Respondent's owner, George Broadwell ("Broadwell"), came in (Tr. 60-61).

20. Broadwell noted that a door to an unused ballroom room adjacent to the bar area was open, disclosing a sloppy unorganized condition, the wine chiller behind the bar was still not

working, and that the wide screen television in the bar was tuned to a different station from the one he had previously directed be kept on (Tr. 173-175).

21. Complainant, working as the bartender that evening, could see Broadwell was upset (Tr. 61).

22. However, Complainant admitted that as far as she was concerned, the wine chiller repair, the need for which she had known for several days, was a manager's responsibility and she was not a manager (Tr. 66-68, 175-176, 191).

23. Complainant also admitted that she had been reminded about what channel the big screen television should be tuned to on multiple occasions but she felt a customer's wishes should be honored (Tr. 177-178).

24. Complainant's witness Spittle confirmed that Broadwell was very particular regarding the television station (Tr. 199).

25. Hawthorn confirmed that Broadwell was very particular about the appearance of his restaurants, including the bar at Captain's Lounge, and that Broadwell believed as bartender Complainant was responsible for the appearance of the bar area and the channel for the wide screen television (Tr. 362-365).

26. On Monday, June 21, 2004 Respondent told Complainant she was laid off (Tr. 66-68, 191, 236).

27. In addition to terminating Complainant, six other employees, both male and female, were either terminated or not replaced when they left or resigned in June 2004 (Tr. 236, 372-376, 378-379, 430-431).

28. Hawthorn and Broadwell had reviewed the revenues generated by each facility on a regular basis, had been concerned about the failure of Captain's Lounge to maintain its

revenues, received discouraging economic report from the accountant on Captain's Lounge revenues for the period January through May, and discussed Complainant's performance and attitude before deciding to terminate Complainant (Tr. 378-379, 427, 471-473; Respondent's Exhibit 15).

29. The unaudited income and expense report on Captain's Lounge demonstrated a loss of revenue from Captains' Lounge in 2004 compared to 2003 (Respondent's Exhibit 7).

30. Respondent's payroll records and scheduling reports showing an overall reduction in man-hours worked in the year 2004 compared to 2003 (Tr. 486-490; Respondent's Exhibit 15).

31. Michelle Garafolo, formerly Respondent's Director of Human Relations, testified regarding Respondent policy and practice of accommodating pregnancy, including her own (Tr. 292-297, 300, 302, 308-309).

32. Although Complainant argued that Respondent's treatment of office workers such as Garafolo and Hawthorn was irrelevant, as she was a bartender/server, Complainant admitted that she had personally worked with one other pregnant server, Crystal Webber ("Webber"), during one of her previous times of employment with Respondent, and that Respondent had neither terminated Webber nor treated Webber any differently during Webber's pregnancy (Tr. 196).

33. Complainant's own witness Spittle confirmed that Webber had worked when pregnant without negative comments or discriminatory actions (Tr. 264, 266-267).

34. Complainant attempted to challenge the economic report produced by Respondent by arguing that Respondent had other restaurant businesses and could shuffle employees among the business where needed, but as explained by Hawthorn, the payroll records produced by

Respondent reflect the location where the work was performed regardless of anticipated schedule (Tr. 506, 508-509).

35. Complainant admitted that the restaurant Ruby Tuesday's had opened, but opined that it would attract a different clientele from Captain's Lounge (Tr. 163). Complainant's own witness Spittle confirmed there was an economic downturn to the Captain's Lounge business in 2004 after Ruby Tuesday's opened (Tr. 276).

36. When given the opportunity to produce additional witnesses to rebut the Respondent's information, Complainant's witness failed to appear, and she reported on the record that she could not depend on his availability for testifying and she could do without his testimony (Tr. 516-519, 522-523).

37. Spittle reported that Complainant's pregnancy was visible two months before June 2004 (Tr. 279-280). This contradicted Complainant's testimony that her pregnancy did not start to show until June 2004 (Tr. 54).

OPINION AND DECISION

Complainant charged the Respondent with unlawful discrimination on the basis of sex (gender) in violation of NYS Executive Law section 296 (1) when it terminated her employment shortly after she disclosed she was pregnant. Complainant established a prima facie case of discrimination. Respondent produced evidence in support of its position that it terminated Complainant, as well as other employees both male and female, because of business reasons associated with declining revenues at Complainant's assigned work location, the Captain's Lounge. Complainant failed to demonstrate that the reasons offered by Respondent were a pretext for illegal discrimination. The complaint should be dismissed.

In analyzing a complaint of discrimination, the Division follows the same criteria set forth for Title VII claim analysis in *McDonnell Douglas Corp. v. Green*, 41 U.S. 792 (1973): A complainant first establishes a prima facie case by showing she is in a protected class, that she is qualified for the position, that she suffers an adverse employment action under circumstances from which an inference of discrimination can be made. After a complainant has established a prima facie case, then a respondent bears a burden of production to offer legally permissible reasons for its actions. Once a respondent has articulated its reasons, the burden of proof requires a complainant to establish that the reasons offered are a pretext for illegal discrimination. *Mittl v. New York State Division of Human Rights,* 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003); *Miller Brewing Co. v. State Division of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S.2d 776, 489 N.E.2d 745 (1985); ***Pace College v. Commission on Human Rights of the City of New York***, 38 N.Y.2d 28, 39-40, 377 NYS2d 471(1975) citing *McDonnell Douglas Corp. v. Green*, 41 U.S. 792 (1973).

In New York, pregnancy discrimination is considered a sex (gender) - based claim. *Brooklyn Union Gas Co. v. NYS Human Rights Appeal Board,* 41 NY2d 84, 390 NYS2d 884, 359 N.E.2d 393 (1976).

Complainant established a prima facie case of discrimination based upon sex (gender) in that she was a pregnant female, she was qualified for and was hired for, the position of part-time bartender/server, and she suffered an adverse employment action when she was terminated shortly after her pregnancy became widely known at the workplace. The timing of her termination, within days after her public admission of pregnancy, gives rise to an inference of discrimination.

In support of its actions, Respondent offered the testimony of its witnesses as to the

economic conditions for the Captain's Lounge after the opening of a Ruby Tuesday's, an economic report from its accountant, a comparison chart demonstrating the reduction in employee hours between 2003 and 2004, a chart establishing the reduction in employees, both male and female in June 2004, and the testimony of several witnesses regarding Respondent's treatment of pregnant employees. The evidence produced at the hearing together with the testimony of witnesses established that business at Captain's Lounge had fallen off after the opening of three new restaurants, including a Ruby Tuesday's, in the immediate vicinity. The evidence produced at the hearing established that in addition to Complainant other employees were terminated or not replaced at the same time, and that the number of employee working hours overall was reduced.

Complainant failed to establish that the economic evidence presented by Respondent was a pretext for illegal discrimination. A Respondent's business decisions, however economically right or wrong they might be, can constitute legitimate, nondiscriminatory reasons for its decisions provided they are not predicated on unlawful discrimination. *Miller Brewing Co. v. State Division of Human Rights*, 66 NY 2d 937, 938 (1985).

Complainant herself acknowledged the reason that the manager's position at Captain's Lounge would not be filled in February 2004 was based on economic considerations. This was several months before Complainant's pregnancy became public knowledge.

In June 2004, six other employees assigned to Captain's Lounge were either terminated or not replaced at the same time as Complainant. None of these were pregnant; and both male and females genders are represented.

The statistics presented establish a pattern of diminishing income and fewer employee hours scheduled prior to Complaint's disclosure of her pregnancy. Although Complainant

[illegible] that the food service business is one in which "fixing the books" is common, she offered no concrete evidence that Respondent did so, or that Respondent manipulated its records as well as the hours and employment of the other employees in order to justify terminating Complainant due to her pregnancy. Complainant admitted that her work hours were dependent upon demand. Complainant admitted that well before she publicly acknowledged her pregnancy she knew the business at the Captain's Lounge was not good.

Complainant claimed that she knew once her pregnancy became known she would be terminated. Complainant's own conduct contradicted this assertion. Complainant had worked for Respondent on many occasions in the past. Complainant had previously worked for Respondent when another coworker, Webber, was pregnant. Complainant knew from that experience that Webber had continued to work while pregnant and as Complainant's own testimony confirmed, Webber had been treated without discrimination. In late February 2004 at a time when she knew herself to be several months pregnant, Complainant had no hesitation about approaching Respondent and asking to be hired. It is unreasonable to think Complainant would approach an employer for a position, if she also knew she would be fired once her pregnancy became obvious. It is more credible that, as Complainant also testified, she was finishing her college degree, wanted a career in the restaurant business, and the position with Respondent offered her an opportunity to get back in the business. She accepted the part-time position knowing there were poor economic indicators at work. Complainant and her witness also acknowledge that her employer, Broadwell, was fussy about the channel to which the wide screen television was tuned, and particular about the appearance in the bar. Complainant chose to disregard directions regarding the channel and the appearance.

In his post-hearing brief the Division's attorney claims that additional information is

necessary in order to investigate to see if Respondent was using Captain's lounge as a "loss center.' His argument is unavailing for several reasons. First: Complainant had an opportunity to rebut Respondent's economics in both December at the regularly scheduled public hearing and in the subsequently scheduled resumption of the public hearing in March. Second, the Division does not second-guess the business decisions of a respondent without a link to an illegal discriminatory motive. *See*: *Anderson v. Stauffer Chemical Co.*, 965 F.2d 397 (7th Cir. 1992). The record established, and Complainant's testimony and that of other witnesses confirmed, that the revenues from Captain's Lounge were decreasing prior to Complainant being hired in late February 2004, well before her pregnancy was announced. The record established through the testimony of both Respondent's and Complainant's witnesses that Captain's Lounge continued to see a downturn in business throughout the summer of 2004 compared with prior year's revenues. That information, extending from before Complainant's hire through the summer, and predating the public acknowledgement of Complainant's pregnancy, precludes any suggestion that there is a nexus between Complainant's pregnancy and an alleged designation of Captain's Lounge as a "loss center."

The ultimate burden of proof is always on the Complainant. *Ferrante v. American Lung Assoc.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997) citing to *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2749 (1993). Complainant failed to meet that burden and the complaint should 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 complaint be and the same hereby is dismissed.

DATED: May 21, 2007
Bronx, New York

Christine Marbach Kellett
Administrative Law Judge