

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

IVETTE RIVERA,

Complainant,

v.

ARGYLE REALTY ASSOCIATES,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 2304680

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on May 25, 2007, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Margaret A. Jackson, 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 Alternative Proposed Order, and all objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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"), WITH THE FOLLOWING CHANGE:

- Due to a typographical error, the introduction of the Alternative Proposed Order ("APO") indicates a compensatory damage award of \$10,000. As the order section of the APO makes clear, however, complainant is awarded \$15,000 as compensatory damages for the mental anguish she suffered plus nine percent

interest, which shall accrue from the date of this Order until the date payment is made. Thus, the introduction section is changed to read \$15,000.

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 22nd day of June, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

Complainant
Ivette Rivera
28-30 Argyle Road
Apt. 3A
Brooklyn, NY 11218

Respondent

Argyle Realty Associates
Attn: Theodore Dalmazio, President
2269 65th Street
Brooklyn, NY 11204

Respondent Attorney

Leonard J. Falcone, Esq.
Falcone & Curd, LLP
58 Hilton Avenue
Hempstead, NY 11550

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Joshua Zinner, Deputy Commissioner for Enforcement
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Margaret A. Jackson
Administrative Law Judge

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
Acting General Counsel

Peter G. Buchenholz
Adjudication Counsel

Matthew Menes
Adjudication Counsel

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

IVETTE RIVERA,

Complainant,

v.

ARGYLE REALTY ASSOCIATES,

Respondent.

**ALTERNATIVE
PROPOSED ORDER**

Case No. 2304680

Complainant alleged that Respondent discriminated against her when it terminated her employment based on her pregnancy. Because the evidence demonstrates that Respondent did discriminate, the complaint is sustained and Complainant is awarded \$1,956 in back wages and \$10,000 in compensatory damages for mental anguish.

PROCEEDINGS IN THE CASE

On December 14, 1995, Complainant filed a verified complaint with the State Division of Human Rights ("Division") charging Respondent with an unlawful discriminatory practice 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 Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to a public hearing.

After due notice, the case came on for public hearing before Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on August 17, 2004 and April 22, 2005.

The Division represented the complaint through Veanka McKenzie, Esq., of Counsel. Respondent was represented by the Law Offices of Leonard J. Falcone, by Leonard Falcone, Esq. of Counsel.

On March 22, 2007, ALJ Jackson issued a Recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit by Respondent's counsel dated April 6, 2007.

FINDINGS OF FACT

1. Respondent Argyle Realty Associates ("Argyle Realty") owns several apartment buildings located at 15, 21, 27, 33, 52, and 58 Argyle Road, Brooklyn, New York. (Tr. 24) Argyle Realty is a limited partnership in which G.P. Argyle Corp. is the general partner. Theodore Dalmazio ("Dalmazio") is the principal and 100 percent shareholder of G.P. Argyle Corp. Respondent provides revenue to G.P. Argyle Corp. and provides the payroll for the building superintendents in the buildings it owns. (Respondent's Exhibit A; Tr. 108-10)

2. In 1995, Dalmazio also held a sixty percent stock interest in DAL Management Corporation ("DAL"). DAL has the same Chairman, Dalmazio, and mailing address as G.P. Argyle Corp. (Autotrack Property Ownership and Deed Transfer Search and ALJ's Exhibit II)

3. Dalmazio actively managed Argyle Realty properties. DAL employed Tony Tardio as a full-time manager/foreman to address tenant complaints and supervise the management office staff, independent contractors and the superintendents. (Tr. 149) DAL, through Dalmazio also supervised,

managed and fired Respondent's superintendents. (Complainant's Exhibit 3; Tr. 27, 48, 73, 78, 96, 133)

4. In May of 1992, Complainant began working as the exclusive superintendent for buildings 15, 21, 27 and 33. (Tr. 7-11) Complainant was paid by Respondent. (Respondent's Exhibit C)

5. Complainant earned \$900 per month. Of this amount, \$400 a month was deducted from her check to cover the rental of her apartment. (Tr. 55) Initially, her job duties included taking out the garbage, making sure the roof was clear of debris, keeping the hallways and yard clean and addressing tenants' complaints. However, after a few years, Complainant's duties changed and in addition to her regular duties, she was required to paint tenants' apartments. The ALJ credited Complainant's testimony that Tardio gave Complainant permission to let her brother paint in her stead. He was also a DAL employee. (Tr. 8-12, 56, 62, 64) Complainant also credibly testified that on one occasion when she traveled to Puerto Rico, Tardio instructed her to have her husband perform her work for her. (Tr. 73-74)

6. Complainant, however, credibly testified that because, "[her] brother had a lot of work too, [she] did it (i.e. painted)." (Tr. 11) Complainant was not supposed to paint because she suffered from asthma, however she, in fact, painted "[b]ecause [she] didn't want to lose [her] job." (Tr. 14)

7. Complainant became pregnant in May of 1995. (Tr. 27-28) On November 15, 1995, she was sent to paint Hilda Bowery's apartment, 1B, in the building at 27 Argyle Road. When she arrived, the tenant did not notice that Complainant was pregnant. After she began painting, the tenant told her that she could not paint the apartment because she did not want to be responsible for any injury that Complainant might sustain. Despite Complainant's willingness to paint, the tenant stopped Complainant from painting and called the management office to inform them that she was not going to let her paint. (Tr. 32-33, 39, 44-45, 152)

8. The next day, Complainant called Dalmazio in the office. He asked her why she had not told him she was pregnant. She told him, "I'm doing okay, I know I'm supposed to do the job ... I told him I knew I was supposed to do the job, but she (the tenant) don't (sic) want me to do it because I'm pregnant" Dalmazio then told her that this was causing him a lot of problems. He said that if she was pregnant, she could not do the job. She explained to him that she was not hired to paint but she would paint as a favor to him. Dalmazio then told her that she was fired and she had to give up her apartment. (Tr. 34-36, 45-46) However, Respondent allowed Complainant to stay in the apartment rent free for six months until May 31, 1996. (Tr. 86-87, 95)

9. On November 21, 1995, six days after Dalmazio discovered she was pregnant, Dalmazio sent Complainant a letter of termination effective November 30, 1995. Despite Dalmazio's denial that he held any position with Respondent (Tr. 110), it is noted that the letterhead is for Respondent Argyle Realty and it is signed by Dalmazio as president. Accordingly, the Division finds that Dalmazio acted in the capacity not only of managing partner, but also as Respondent's president. (ALJ's Exhibit I (Respondent's March 21, 2002, Notice of Motion and Affidavit); Complainant's Exhibit 3; Tr. 48)

10. The ALJ credited Complainant's testimony that she felt badly about her employment being terminated. (Tr. 49) She credibly testified that she cried as a result of losing her job. (Tr. 50) At the hearing, Complainant needed to take a break when testifying about the emotional distress she suffered. Clearly, she still experienced hurt up through the date of the hearing. (Tr. 50) She credibly testified that because she missed her job, "[e]ven now (at the time of the hearing) when [she] look[s] at the buildings [she] feel[s] bad ..." (Tr. 87) She credibly testified that she was worried that having lost her job, she would be unable to buy anything for her baby. Though she

admitted that her husband was working, she indicated that "he wasn't making enough money." (Tr. 49-51, 54, 90)

11. After separating from employment with Respondent, Complainant testified that she collected \$104 per week for one year in unemployment benefits. It is noted that she was only unemployed for nine months, or thirty-six weeks. (Tr. 57, 94)

12. Complainant actively sought alternate employment as is evidenced by the fact that she was required to demonstrate to the Department of Labor that she was actively looking for work in order to receive unemployment benefits. She credibly testified that she looked for employment in stores and that she inquired into other superintendent positions. (Tr. 56, 91)

13. In September of 1996, Complainant found another position as a superintendent earning \$400 per month that included a rent free apartment. (Tr. 57)

14. It is noted that according to Respondent's payroll records, throughout 1995, Respondent employed and paid no more than three employees at any given time. (Respondent's Exhibit C; Tr. 23, 121-25)

DECISION AND OPINION

Complainant alleged that her employment was terminated by Respondent in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law"). Respondent contended that it did not unlawfully discriminate against Complainant and further that at the time of the termination, in December of 1995, it was not an employer within the definition of Human Rights Law § 292.5. After a careful review of the record, the ALJ correctly determined that Respondent is subject to the jurisdiction of the Division and that Respondent's reasons for terminating Complainant's employment after learning of her pregnancy constituted a violation of the Human Rights Law.

Section 292.5 provides, that “[t]he term employer does not include any employer with fewer than four persons in his employ.”

“When the person who is allegedly responsible for the discriminatory acts is acting on behalf of the [respondent], that person should be included in the jurisdictional count...” *Copley*, 1981 U.S. Dist. Lexis 10497 at *10 (S.D.N.Y. 1981). Dalmazio, Respondent’s general partner and president, terminated Complainant’s employment upon learning that she was pregnant. Dalmazio is therefore the person responsible for the unlawful discriminatory practice. Accordingly, Respondent falls under the jurisdiction of the Division.

Furthermore, the court in *Copley* indicated that several factors must be considered in determining whether there is a basis to add employees from another corporation for jurisdictional purposes. These factors include: “(1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control.” *Copley v. Morality in Media, Inc.*, 1981 U.S. Dist. Lexis 10497 at *6.

A review of the evidence indicates that DAL managed the properties for Respondent Argyle Realty and that G.P. Argyle Corp., which was the general partner of Respondent Argyle Realty, and DAL had the same chief corporate officer, Dalmazio. Dalmazio also hired and fired the superintendents paid by Argyle Realty. DAL’s manager, Tardio, supervised superintendents. Furthermore, Dalmazio was both the general partner and president of Respondent Argyle Realty. This interrelationship of operations and management indicates apparent involvement in personnel decisions, common ownership and financial control.

Human Rights Law § 296.1, states in pertinent part, “it shall be an unlawful practice...[f]or an employer...because of the...sex...of any individual...to...discharge from employment such

individual..." Pregnancy discrimination is a form of gender discrimination. *Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

In order to prove a prima facie case of sex discrimination, Complainant must show that: (1) she was a member of a protected class, (2) she was qualified for the position, (3) she suffered a negative employment action, and (4) her termination or separation from employment occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is established, the burden of production then shifts to Respondent to rebut the presumption of discrimination. Once Respondent has produced such evidence, Complainant must then prove that the proffered reasons are a pretext for discrimination. The ultimate burden rests with Complainant, and conclusory allegations are insufficient to meet this burden. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)).

Complainant has established a prima facie case. Complainant is a member of a protected class who was qualified as a superintendent of buildings, and she was fired by Respondent within days of discovering that she was pregnant. Furthermore, a nexus between Complainant's pregnancy and the termination exists because Dalmazio told her that because she was pregnant, she could not perform her job duties and, therefore, was fired. This occurred despite Complainant's continuous attempts to convey to Dalmazio her willingness and availability to perform her job duties.

Dalmazio's claims that Complainant was terminated because she was not authorized to let other people perform her job is clearly pretextual both because Tardio told Complainant that her brother and her husband could paint for her and because Dalmazio, in fact, terminated Complainant claiming that because she was pregnant she could not perform her duties.

Accordingly, Complainant is entitled to an award for her loss of back wages which was \$900 for a period of nine months, less \$2,400, the value of her apartment (\$400) for a period of six months from December 1, 1995 through May 31, 1995 when she was permitted to remain there. The \$5,700 is to be further reduced by \$3,744, the amount of unemployment insurance Complainant collected (\$104 multiplied by 36 weeks). In sum, Complainant's compensatory damage award is \$1,956.

Complainant further testified that Respondent's discriminatory action caused her mental anguish and suffering. Respondent's discriminatory action caused hurt and sorrow to Complainant. She would wake up at night crying because feared she would be unable to purchase anything for her child because of the loss of her job. It is apparent that up to the date of the hearing, she continued to feel anguish as a result of Respondent's discriminatory actions. Therefore, an award of \$15,000.00 to Complainant is justified in this case. See *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882; 727 N.Y.S.2d 499 (3rd Dept. 2001); *Georgeson & Co. v. State Div. of Human Rights*, 267 A.D.2d 126, 700 N.Y.S.2d 9 (1st Dept. 1999); *NYC Health & Hospitals Corp. v. State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); *State Div. of Human Rights v. Demi Lass Ltd.*, 232 A.D.2d 335, 648 N.Y.S.2d 925 (1st Dept. 1996).

ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment in violation of the Human Rights Law; it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within sixty days of receipt of the Commissioner's Final Order, Respondent shall pay to Complainant a back pay award as compensation for her lost wages and the value of her apartment in the amount of \$1,956. Interest on the back pay award at a rate of nine percent per annum shall accrue from a reasonable intermediate date, April 15, 1996, until payment is made.

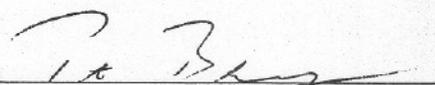
2. Within sixty days of the receipt of the Commissioner's Final Order, Respondent shall also pay to Complainant the sum of \$15,000.00 without any withholding or deductions, as compensatory damages for mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination. Interest on the compensatory damages award at a rate of nine percent per annum shall accrue from the date of the Final Order until the date payment is made.

3. The aforesaid payments shall be in the form of two certified checks made payable to the order of Complainant, Ivette Rivera to her address at 28-30 Argyle Road, Apt. 3A, Brooklyn, New York 11218 and delivered by certified mail, Return Receipt Requested.

4. Respondent shall simultaneously furnish written proof of the aforesaid payments to Caroline J. Downey at her office address of One Fordham Plaza, 4th Floor, Bronx, New York 10458 by first-class mail and shall cooperate with representatives of the Division during any investigation into the compliance with the directives contained herein.

5. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained herein.

DATED: **MAY 25 2007**
Bronx, New York


PETER G. BUCHENHOLZ
Adjudication Counsel