NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TARA ANN ROLLERI,
Complainant,

v.

KAPS-ALL PACKAGING SYSTEMS, INC.,
Respondent.

NOTICE AND FINAL ORDER

Case No. 6842199

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 December 7, 2007, 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 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 11th day of January, 2008.

_____

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TARA ANN ROLLERI,
Complainant,
v.

KAPS-ALL PACKAGING SYSTEMS, INC.,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **6842199**

SUMMARY

Complainant alleges that Respondent unlawfully terminated her employment because of her pregnancy. Respondent denied unlawful discrimination. The New York State Division of Human Rights ("Division") finds that Respondent did not discriminate against Complainant. Accordingly, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 18, 2003, Complainant filed a verified complaint with the 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 an unlawful discriminatory practice. 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 July 25 and 26, 2007 and August 1, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Neil M. Frank, Esq. and Pamela J. Eisner, Esq. Respondent was represented by Thomas C. Sledjeski, Esq.

Complainant and Respondent filed belated post-hearing briefs on September 7, 2007.

FINDINGS OF FACT

1. Respondent operates a manufacturing plant that produces machinery used in the bottling industry. (Tr. 253) In 2002, Respondent had approximately forty employees. (Tr. 264)

2. Complainant interviewed with Respondent's president, Kenneth Herzog, for a secretarial position in early October 2002. (Tr. 78-79, 81; Complainant's Exh. 2) A few weeks later, she interviewed with Maria Angland, who handled accounting and payroll functions for Respondent in 2002. (Tr. 84, 276-78, 389, 406) Respondent hired Complainant on or about November 12, 2002. (Tr. 88, 279, 288; Complainant's Exh. 4)

3. Complainant was hired as part of the secretarial staff which consisted of approximately four individuals. (Tr. 256, 261, 279-80, 450) In addition to the secretarial staff, Respondent employed an accounting staff which consisted of Angland and Kelly Hawes. (Tr. 261, 274-75, 397) At that time, Hawes performed banking, bookkeeping and accounts payable functions. (Tr. 275, 387, 397-98, 402) Complainant's duties were secretarial in nature and primarily included typing up purchase orders, answering telephones, putting together manuals and preparing set-up sheets. (Tr. 256, 279-80, 545)

4. Complainant reported to Herzog and Casey Mehlinger, manager of Respondent's production facility. (Tr. 86, 93, 262-63, 538)

5. When Complainant was hired, Respondent provided Complainant with an employee manual. (Tr. 90, 188; Complainant's Exh. 3) The employee manual states that all new employees are subject to a six month probation period. (Complainant's Exh. 3) However, Complainant signed an affidavit on the day she was hired stating that she was subject to a three month probation period. (Complainant's Exh. 4) The credible record establishes that the probation period used by Respondent was of little practical import with regard to an employee's job security. (Tr. 439-40, 752-53, 756, 788)

6. It is undisputed that Complainant, like other employees, knew she was required to punch a timecard and be ready to start work no later than 7:59:59 a.m. (Tr. 103, 193, 271-72, 282-83; Complainant's Exh. 3) Respondent's employees were also required to adhere to strict break and lunch times. The work day ended at precisely 4:30 p.m., at which time employees were required to punch their timecards again. (Tr. 282; Complainant's Exh. 3) It is undisputed that Respondent placed great emphasis on its time and attendance policy and that any violation of the policy could result in dismissal. (Tr. 103, 193, 268, 271, 287, 454, 479; Complainant's Exhibits 3, 4)

7. Almost immediately after she began her employment with Respondent, Complainant had trouble complying with Respondent's time and attendance policy. (Tr. 103-04, 175-76, 296-98; Complainant's Exh. 6) Angland, who reviewed employee timecards, alerted Herzog to Complainant's time and attendance problems. (Tr. 297, 314, 701-02)

8. Complainant and Herzog met within the first few weeks of Complainant's employment to discuss Complainant's time and attendance troubles. (Tr. 299-301) At that time, Complainant

informed Herzog that she believed that Respondent's time clock was five minutes fast. (Tr. 103, 299) Herzog checked the time clock, found that it was three minutes fast and adjusted the time clock accordingly. (Tr. 126, 302)

9. In the early months of her employment with Respondent, Complainant maintained that Herzog told her that it was alright if she arrived to work a little late as long as she completed her work for the day. (Tr. 108) However, the credible record does not support this assertion. Complainant maintained that she was often late to work because she had to drop her son off at a day care facility at 7:30 a.m. that was roughly twenty miles away from Respondent's facility. (Tr. 103-08, 306) Complainant's co-worker in the front office, Diane Mehlinger, also dropped her child off at 7:30 a.m. at a day care facility adjacent to the day care facility Complainant used. (Tr. 306-07, 467, 517-18, 529) Unlike Complainant, Diane Mehlinger was able to sustain a satisfactory time and attendance record. (Tr. 307, 468, 518; Complainant's Exh. 15)

10. The record establishes that Complainant consistently had problems with her time and attendance throughout her employment with Respondent. (Tr. 175-76, 302-03, 314, 597, 704; Complainant's Exh. 6; Respondent's Exh. 2)

11. Complainant denied that her work performance was substandard. (Tr. 133-35, 202-03, 817-18) She admitted that she made one mistake when she unilaterally changed a purchase order without prior authorization. (Tr. 203) Complainant asserted that she received a bonus of $200.00 at the end of 2002. (Tr. 129; Respondent's Exh. 5) However, the record establishes that all employees received money at the end of the year and that Complainant received money that was commensurate with other employees who had similar brief work tenure at the end of 2002. (Tr. 216, 312, 413, 795-96; Respondent's Exh. 5)

12. The record establishes that Complainant consistently made mistakes in the performance of her job duties and was often inattentive to her work. (Tr. 308, 315-16, 330, 332-37, 344-45, 469, 506, 552-62, 572, 687-99) Angland, Diane Mehlinger and Casey Mehlinger brought these concerns to Herzog's attention. (Tr. 303-04, 308, 315-16, 330-31, 561-62, 572, 704) Diane Mehlinger credibly testified that Complainant sometimes appeared inattentive to her work. (Tr. 469, 477) Casey Mehlinger testified that Complainant consistently made a variety of mistakes handling purchase orders during the course of her employment. (Tr. 552-62, 572, 687-96) Although Casey Mehlinger and Herzog spoke to Complainant about these problems, Complainant did not improve her performance. (Tr. 308, 315-16, 560-61, 572)

13. The record firmly establishes that Complainant's pregnancy became common knowledge in the company in or about January 2003. (Tr. 135-37, 317, 457, 562-64) Complainant maintained that when Herzog found out about her pregnancy, he approached her and asked her if she was "expecting another headache." Complainant averred that Herzog was referring to her pregnancy when he made this comment. (Tr. 136) However, Herzog denies ever making any derogatory comments about Complainant's pregnancy. (Tr. 317-18) Complainant's testimony on this issue is not corroborated in the record.

14. Furthermore, Complainant maintained that Herzog's attitude toward her changed after he discovered that Complainant was pregnant. (Tr. 135) However, Complainant cannot point to tangible acts by Herzog in support of this allegation. (Tr. 142-43, 151-54) Complainant admitted that she had a poor recollection of the events in issue and stated that she felt that Herzog treated all employees poorly. (Tr. 154-55) Furthermore, the credible record supports the conclusion that Herzog's demeanor toward Complainant did not change after he became aware of her pregnancy. (Tr. 319-20, 324, 420-21, 458, 462-63, 564, 566-67)

15. Complainant identified Hawes as her primary comparator. (Tr. 236-38, 245, 358-59) At first blush, Hawes's timecards appear to show consistent time and attendance problems. (Respondent's Exh. 3) However, Hawes credibly testified that the vast majority of these apparent time and attendance issues related to banking, party planning and other functions that Hawes performed as part of her job duties for Respondent. (Tr. 398, 400-04, 412, 414, 419-20) Hawes's testimony is corroborated by Herzog's testimony and Angland's written notations on Hawes's timecards. (Tr. 273-75, 426; Respondent's Exh. 3)

16. Complainant asserted that Herzog treated a former employee, Barbara Dalley, unfairly when Dalley became pregnant. (Tr. 160-61, 217) On the contrary, the record establishes that Dalley, also known as Barbara Berliner, was pregnant two times during her employment with Respondent and that Respondent provided her with time off from work and allowed her to return to work after she gave birth. (Tr. 346-49, 461, 577; Respondent's Exh. 6)

17. Complainant claimed that on March 11, 2003, she did not come to work because there was a fire at her son's school. (Tr. 147) On March 12, 2003, Herzog terminated Complainant's employment at the end of the work day. (Tr. 149-50, 213-14, 330-31; Respondent's Exh. 2) Respondent maintained that it terminated Complainant's employment because of her poor time and attendance, poor attitude and poor job performance. (Tr. 332-33, 571-72, 704; Respondent's Exh. 2)

OPINION AND DECISION

The record does not establish that Respondent unlawfully discriminated against Complainant because of her pregnancy by terminating her employment on March 12, 2003.

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a) prohibits an employer from discharging an employee because of her pregnancy. *Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). Complainant has the burden of establishing a prima facie case by showing that she is a member of a protected group, that she was discharged from a position for which she was qualified and that her discharge 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 Complainant's discharge. The ultimate burden rests with Complainant to show that Respondent's proffered explanations are a pretext for unlawful discrimination. *See Id.*

In the instant case, Complainant has demonstrated a prima facie case of discrimination. She is a member of a protected class and she was qualified for the secretarial position for which she was hired. Next, she suffered an adverse action when Respondent terminated her employment on March 12, 2003. Finally, Complainant's allegations that Herzog made a derogatory comment about her pregnancy, treated her unfairly as a result of her pregnancy and terminated her employment approximately two months after he found out she was pregnant are sufficient to establish an inference of discrimination. *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).

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 maintained that it terminated Complainant's employment because she had consistent time and attendance problems and she consistently demonstrated performance problems.

The record is replete with references regarding Respondent's rigorous time and attendance policy. Complainant admitted that she was fully aware of this policy when she was hired. Respondent presented credible evidence establishing Complainant's excessive, unexcused time and attendance deficiencies.

Respondent also presented credible evidence that Complainant was often inattentive to her work and that she made mistakes in the performance of her job duties. Although Respondent addressed these problems with Complainant during the course of her employment, Complainant did not improve her performance.

The burden then shifts back to Complainant to show that these reasons are a pretext for unlawful discrimination. Complainant identified Hawes as her primary comparator. She claimed that Hawes had a poor time and attendance record and yet Respondent did not discipline or discharge Hawes. At first blush, Hawes appears to have a poor time and attendance record. However, Hawes performed different job functions than Complainant. The credible record establishes that the vast majority of Hawes's apparent time and attendance issues related to banking, party planning and other functions that Hawes performed as part of her job duties for Respondent.

Complainant also claimed that Respondent allowed Complainant to arrive late to work because of her child's day care needs. This is not credible, especially in light of Respondent's stringent time and attendance policy. Moreover, the record shows that Diane Mehlinger, who

worked in the front office with Complainant, also dropped her child off at 7:30 a.m. at a day care facility adjacent to the day care facility Complainant used. However, Diane Mehlinger did not have the same consistent time and attendance problems that Complainant experienced.

Next, Complainant maintained that she received a bonus in December 2002 as evidence that her performance was satisfactory. However, the record establishes that all employees received money at the end of the year and that Complainant received money that was commensurate with other employees who also had brief work tenure at the end of 2002.

Furthermore, Complainant argued that she was fired after her probation ended. However, there is some confusion in the record regarding the exact length of Complainant's probation period. Nevertheless, the credible record establishes that the probation period used by Respondent was of little practical import with regard to an employee's job security.

Finally, Complainant asserted that Herzog treated Dalley, a former employee, unfairly when Dalley was pregnant. On the contrary, the record establishes that Dalley was pregnant two times during her employment with Respondent and that Respondent provided Dalley with time off and allowed her to return to work after her pregnancy.

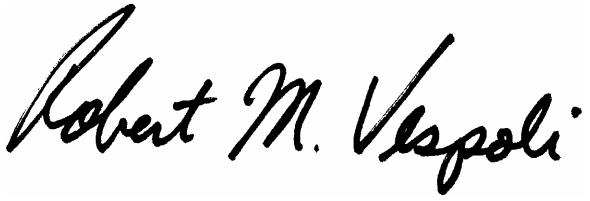
The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against her. *See Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant has failed to meet her burden.

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: December 4, 2007
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge