

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DILRUBA RUMMAN,

Complainant,

v.

DUANE READE,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 2308745

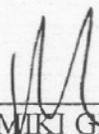
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on February 2, 2007, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

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 12th day of April, 2007.



KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

on the Complaint of

DILRUBA RUMMAN

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RECOMMENDED FINDINGS OF
FACT, DECISION AND OPINION,
AND ORDER

Case No. 2308745

PROCEEDINGS IN THE CASE

On April 8, 2003, Complainant filed a verified complaint with the State Division of Human Rights (Division), charging Respondent 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 Robert J. Tuosto, an Administrative Law Judge (A.L.J.) of the Division. A.L.J. Roberts held a Public Hearing on August 15-17, 2005, January 31, 2006, and February 1-2, 2006. A.L.J. Roberts subsequently retired from state service. ALJ Robert J. Tuosto continued the Public Hearing on October 11, 2006.

Complainant and Respondent appeared at the hearing. The Division was represented by Gina M. Lopez Summa, General Counsel, by Stephen Lee, of counsel. Respondent was represented by Stephen A. Fuchs, Esq. of the law firm Littler Mendelson P.C.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

The Parties

1. Complainant, a former cashier for the respondent, alleges that her employment was terminated because she was pregnant. (ALJ Exhibit 1)

2. Respondent, a drug store chain, defends on the ground that the termination was caused by complainant having sold cigarettes to a minor in violation of company policy, and that her pregnancy did not enter into its termination decision. (ALJ Exhibit 2; Respondent's Exhibit 9)

Complainant Begins Working for Respondent

3. In January, 2001, complainant commenced employment with respondent as a cashier at its store located at 71 West 23rd Street, New York, N.Y. ("store"). Complainant's employment responsibilities included working as a cashier and, during slow periods, working on the sales floor. (Respondent's Exhibit 9; Tr. 14-17, 340, 379)

4. Complainant, as a full-time employee of respondent, received health insurance and other benefits. (ALJ Exhibit 1)

Complainant Is Made Aware of Respondent's Policy Prohibiting the Sale of Cigarettes to Minors ("Policy")

5. On January 20, 2001, at the time of first becoming employed with respondent, complainant signed a document informing her that she was prohibited from selling cigarettes to those under 18 years of age. (Respondent's Exhibit 3; Tr. 70-71, 381-382)

6. From March 15, 2000, until sometime in January, 2003, Mohammed Kabir (“Kabir”) was respondent’s store manager. The store procedure for the sale of tobacco products was such that, if the customer did not appear to be older than 27 years of age, the cashier would ask for identification and verify the date of birth. The cashier would then press the “enter” key on the cash register showing that the date of birth verified that the customer was eligible for the sale of tobacco products. (Tr. 510-511)

A Coworker Sells Cigarettes to Minors and Does Not Have Her Employment Terminated

7. On June 6, 2001, Begum Jahan started working for respondent as a cashier. At the time she was hired she was not given an employee handbook, but was verbally told about the policy. Jahan signed an ‘Employee’s Agreement of Understanding’ that she would not sell tobacco products to anyone under 18 years of age, and that if the person appeared to be under 27 years of age, she would require valid photo identification of the person’s date of birth. Jahan knew that she could possibly be terminated if she sold cigarettes to a minor. (Respondent’s Exhibit 6; Tr. 118, 120, 128, 130)

8. Approximately one month after she was hired, Jahan sold cigarettes to a minor. Jahan’s name was not on the New York City Department of Consumer Affairs (“DCA”) summons, but she was identified by DCA inspectors as the cashier who sold cigarettes to a minor. Jahan was not pregnant at the time. (Complainant’s Exhibit 10; Tr. 121-122, 514-517)

9. Kabir told Jahan that she had sold cigarettes to a minor and that she would be suspended for two days. Nothing else happened to Jahan after her two day suspension. Jahan returned to

work, did not receive any further training and did not meet with respondent's Human Resources personnel. (Tr. 125-126)

10. I find that Jahan's violation of the policy occurred prior to the change in the policy's penalty.

Respondent is Made Aware of Complainant's Pregnancy

11. In November, 2002, complainant informed Kabir of her pregnancy. (ALJ Exhibit 1)

12. In March, 2003, Mohammed Anwar ("Anwar") became respondent's new store manager. Anwar Khalil ("Khalil") was the assistant store manager. (Tr. 463-464)

13. At the end of February, 2003, complainant discussed her pregnancy with Anwar within the context of arranging for her mother to come to the United States. (ALJ Exhibit 1; Tr. 466)

The Penalty Aspect of the Policy is Changed in Early 2003

14. In the fall of 2002, respondent had been experiencing problems regarding violations issued by the DCA concerning the sale of tobacco products to minors. The resulting violations caused two of respondent's stores to lose their licenses to sell tobacco products. Respondent's Director of Human Resources, Seymour Stein ("Stein"), was charged with imposing discipline upon any employee who violated respondent's policy that tobacco products were not to be sold to minors. In February or March, 2003, respondent's Vice President for Human Resources James Rizzo told Stein that an employee selling tobacco products to minors was to be

terminated. There were no exceptions to the imposition of this penalty. (Tr. 538-542, 582-583, 601, 605)

15. Prior to this time the penalty regarding employee sales of tobacco products to minors was discipline other than termination. The penalty change took place in early 2003. (Tr. 545, 606)

16. On February 10, 2003, the change in penalty was communicated via electronic mail to, among others, all of respondent's store managers and assistant managers. Specifically, the message stated, "*Remember, anyone caught in violation will face civil penalties and loss of job and store managers can also face disciplinary action if it is found that the cashier was not trained.*" (Respondent's Exhibit 22; Tr. 546-547, 616-618)

17. Respondent's 'Employee Rules Handbook' which was in force at the time of complainant's termination stated, in pertinent part, that violation of the policy could result in disciplinary action for the offending employee "*...up to and including termination.*" (Respondent's Exhibit 9)

Complainant Subsequently Sells Cigarettes to a Minor in March, 2003

18. On March 14, 2003, Anwar received a phone call from Khalil that a store cashier had sold cigarettes to a minor, and that the cashier was given a violation for having done so. DCA inspectors identified complainant to Khalil. Khalil then asked Anwar for direction. He was told by Anwar to inform the district manager and Stein, and to send an e-mail message to both regarding the incident. Stein called back and told him to send complainant to meet with him at respondent's main office. (Tr. 469-471)

19. There are two separate DCA inspectors employed in each case of alleged tobacco sale violation. (Tr. 395)

20. As a matter of procedure, DCA inspectors identify the offending cashier in several ways including by name, badge number, physical description, and by possession of the cash register receipt. (Tr. 637)

21. While complainant was working in the store on the sales floor, Khalil told her that she had sold cigarettes to a minor and that, as a result, she would be suspended for one day. Complainant denied that she had done this and asked Khalil when this had happened. Khalil replied that it occurred 15 minutes earlier. (Tr. 21- 22, 86)

22. Complainant worked at the respondent's store on March 16 and 17, 2003. On the evening of March 17, 2003 complainant was informed that she was terminated for having sold cigarettes to a minor. (Tr. 21-22)

23. On March 17, 2003, complainant was also informed that she would be losing her employee benefits including her health insurance. (ALJ Exhibit 1)

24. Complainant requested a copy of the DCA papers served on the respondent alleging that she sold cigarettes to a minor, and other documents relating to this incident. Complainant did not recall whether she received these documents, although she was shown a copy of the DCA summons. (Complainants Exhibits 1, 2; Tr. 22-26)

Complainant Meets with Respondent's Director of Human Resources

25. Stein had been respondent's Director of Human Resources since February, 1994.

Stein is responsible for investigating all cases of discrimination. In late February or early March, 2003, Stein also took over all cases involving tobacco sale violations. (Tr. 355, 356, 582)

26. Prior to late February or early March, 2003, all summonses, including tobacco violations, were handled for the respondent by an outside vendor who paid fines directly to the DCA. After Stein took over cases involving tobacco violations the penalty was changed to termination of the offender's employment. Previously, the discipline of employees in these cases was left to district managers who managed approximately 16 of the respondent's stores. The penalties imposed by these managers were not consistent and varied from up to three days suspension to termination of employment. (Tr. 360-362)

27. Stein terminated the employment of approximately 90 employees since taking over enforcement of respondent's policy. All of respondent's New York State employees who violated the policy were terminated. (Tr. 385-386)

28. Starting in 2003, DCA violations for the sale of tobacco products contained the name of the person who sold cigarettes to a minor. Respondent terminated all of the individuals named in DCA summonses since early 2003. (Respondent's Exhibit 16; Tr. 395-396)

29. For instance, two of respondent's employees working in stores in Brooklyn were terminated for policy violations on February 16, 2003, and March 5, 2003, respectively. (Respondent's Exhibit 23; Tr. 592-593)

30. Stein met with Complainant and was shown the DCA violation which contained her name. Complainant replied that she did not recall selling cigarettes to a minor. Stein informed the complainant that she had been identified by DCA inspectors as the person who sold the cigarettes. Stein also informed the complainant that it was respondent's procedure to terminate the employment of those employees who sold cigarettes to minors. There was no discussion at that time of complainant's pregnancy or employee benefits. Stein had the sole role in terminating complainant's employment. (Tr. 412-418)

DECISION AND OPINION

Complainant alleged that she was the victim of unlawful discrimination based upon her pregnancy. Respondent denied unlawful discrimination and averred that complainant's employment was terminated after she rendered unsatisfactory job performance. Complainant failed to show that respondent's reason for her termination was a pretext for unlawful discrimination and her complaint is hereby dismissed.

N.Y.S. Human Rights Law § 296 (1) states, in pertinent part, "it shall be an unlawful practice for an employer...because of the...sex...of any individual...to...discharge... such individual..." Pregnancy is a form of sex discrimination. Elaine W. v. Joint Disease N. Gen. Hosp., Inc., 81 N.Y.2d 211, 597 N.Y.S.2d 617 (1993); Mittl v. New York State Division of Human Rights, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). A complainant may establish a prima facie case of unlawful discrimination on the basis of pregnancy by demonstrating that: 1) she is a member of a protected class, 2) she satisfactorily performed her job duties, 3) she was discharged; and 4) her position remain open and was ultimately filled by a non-pregnant

employee or that that discharge occurred under circumstances giving rise to an inference of discrimination. Koppenal v. Nepera, Inc., 74 F. Supp 2d 409 (1999)

Here, complainant's prima facie case must fail. While complainant was unquestionably a member of the protected class, she nonetheless cannot show that she rendered satisfactory performance to her employer upon selling cigarettes to minors in violation of a known company policy.

The record shows that complainant admitted that respondent's policy at all times was that cigarettes were not to be sold to minors. The testimony of complainant's former store manager, as well as a coworker, established that it was always a violation of the respondent's policy for an employee to sell cigarettes to minors, and that the offending employee would be disciplined for violating this policy.

Respondent showed that complainant sold cigarettes to a minor after the penalty was changed. This was unlike Jahan's violation of the policy which occurred prior to this event. Further, complainant's improper cigarette sale was witnessed by two separate DCA inspectors who identified her in several ways as the offending cashier.

Respondent offered legitimate reasons for the change in the penalty aspect of the policy, namely, that earlier violations had caused two of its stores to lose their licenses, as well as the inconsistent imposition of discipline under the old regime. Also, the new penalty was uniformly applied after being put in place. This was shown when two cashiers had their employment terminated at the relevant time period. It was also shown by respondent's subsequently terminating the employment of all its New York State employees who violated the policy.

It is well-settled under the N.Y.S. Human Rights Law that the burden of proving unlawful discrimination always remains with a complainant. See Pace College v. Commission of Human

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Rights of the City of New York, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975). Complainant failed to show that respondent's reason for terminating her employment was a pretext for unlawful discrimination. Therefore, complainant has failed to meet her burden and her complaint is hereby dismissed.

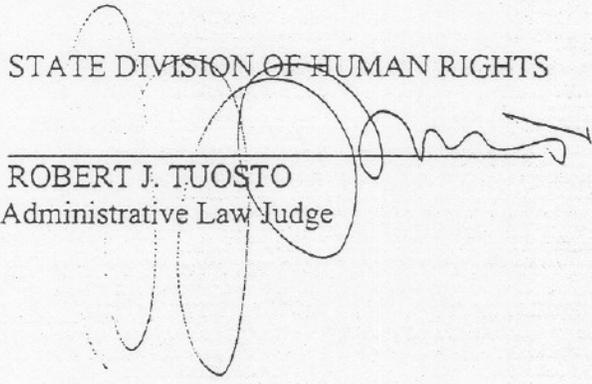
ORDER

Based on the foregoing, and pursuant to the provisions of the N.Y.S. Human Rights Law, and the Rules of Practice of the Division, it is

ORDERED, that the complaint be, and the same hereby is, dismissed.

Dated: February 2, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS


ROBERT J. TUOSTO
Administrative Law Judge