

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RENEE TONUCCI,

Complainant,

v.

DUPLICATING CONSULTANTS, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10111411

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 27, 2009, by Michael T. Groben, 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: **MAY 28 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10111411

SUMMARY

Complainant charges Respondent with unlawful discrimination in the workplace, alleging that she was subjected to a hostile work environment and differential treatment due to her status as a pregnant female. Respondent denies these allegations. Complainant has failed to satisfy her burden of proof, and it is recommended that the complaint be dismissed.

PROCEEDINGS IN THE CASE

On May 15, 2006, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on October 27, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Harvey P. Sanders, Esq. Respondent was represented by Justin S. White, Esq.

Permission to file post-hearing briefs was granted, and proposed findings of fact and conclusions of law were timely filed by both parties.

FINDINGS OF FACT

1. Respondent Duplicating Consultants, Inc. sells and services photocopying equipment, and employs approximately eight to nine salespeople. (Tr. 19)
2. Complainant is a female. (Tr. ALJ Exhibit 2)
3. John Rocchio is Complainant's father, and the president and owner of Respondent Duplicating Consultants, Inc. (Tr. 61, 276-77) Respondent's salespersons work within several sales territories, which are delineated and assigned by John Rocchio. (Tr. 59-60, 220) These territories are defined both geographically and also by the type of business of potential customers. Non-profit customers, such as educational institutions, are generally assigned to a specific salesperson as a separate sales territory which spans geographical boundaries. (Tr. 29-30, 239)
4. In 1995, Complainant was hired by John Rocchio to work as a salesperson for Respondent. (Tr. 61, 118, 278) She was then assigned to work with for-profit customers in the Amherst territory. (Tr. 10, 32-33, 63-64, 125-26) Complainant was also assigned to work with other valued customers outside the Amherst area, including a group of car dealerships known as

“West Herr”, and several newspapers. Complainant was permitted to retain these assignments while working in Amherst. (Tr. 64-66, 127-130, 282, 321)

5. John Rocchio also permitted Complainant to develop and maintain the libraries of the State University of New York at of Buffalo as a customer, although this was a non-profit entity. (Tr. 67-69, 130-32, 282-83, 336-39)

6. At all times relevant to the complaint, Complainant was both Respondent’s highest paid salesperson, and only female salesperson. (ALJ Exhibit 2; Tr. 32-33, 62, 139, 183, 222, 223-24, 227, 302)

7. Carol Rocchio is John Rocchio’s wife and Complainant’s step-mother. She has been employed as Respondent’s payroll clerk since June or July of 2004. (Tr. 39, 256)

8. Doug Tonucci is Complainant’s husband. (Tr. 9) He was hired to work as a salesperson by Respondent in May 2004, shortly before he married Complainant. (Tr.10, 18, 21-22, 37, 256) He initially worked in the West Seneca territory, also known as the South Buffalo territory. (Tr. 142, 224)

9. Craig Hicks (“Hicks”) was Respondent’s general sales manager and Complainant’s immediate supervisor for approximately three to four years prior to July 2005. (Tr. 103, 219-222) Hicks was also Doug Tonucci’s immediate supervisor. (Tr. 224)

10. In or about October of 2004, Carol Rocchio advised John Rocchio that Complainant was pregnant. (Tr. 333)

11. In or about January 2005, John Rocchio assigned Doug Tonucci to work in the Amherst territory. (Tr. 11, 22, 333-34)

12. John Rocchio testified that Complainant had requested that he put Doug Tonucci in the Amherst territory; both Complainant and Doug Tonucci denied making such a request. (Tr. 11,

27, 143-44, 288-90, 298, 334) Neither Doug Tonucci nor Complainant complained to John Rocchio or Hicks about this reassignment. (Tr. 33, 225-26)

13. At all times relevant to the complaint, the Amherst territory was considered to be Respondent's best sales territory, due to the ongoing growth of business in the Amherst area. (Tr. 31, 222-23, 280-81) Complainant testified that she was unaware whether business opportunities in the Amherst territory were expanding or contracting at that time. (Tr. 127, 144-45) Because of Complainant's acknowledged performance and expertise in this field, I find her testimony on this issue not credible.

14. Both Hicks and John Rocchio testified credibly that there was enough business in the Amherst territory for two salespersons. (Tr. 225, 298-99)

15. Doug Tonucci's earnings rose when he was assigned from the West Seneca territory to the Amherst territory. (Respondent's Exhibit 1, 2, 3; Tr. 23, 44, 49-53, 181, 291-97, 298-99)

16. In 2003, Complainant earned over \$96,000.00 in salary, bonuses, and commissions, and slightly more than that in 2004. In the first six months of 2005, Complainant earned nearly \$55,000.00 in salary and commissions prior to going out on maternity leave. (Complainant's Exhibit 2, 3, 4; Tr. 299-300)

17. Respondent's salespersons were also given extra pay, referred to as a "gas bonus", as part of their compensation. Complainant was denied this on one occasion in 2005, and on two occasions in 2004, because she had been late to work. (Complainant's Exhibit 5, 6; Tr. 42, 88-95, 349-50) Complainant testified that, in contrast, male salespersons were permitted to habitually spend two to three hours at a local restaurant eating lunch and playing video games, and that she had complained to John Rocchio regarding this, to no effect. John Rocchio denied that Complainant had complained to him regarding this issue. (Tr. 96-97, 350-51)

18. Complainant earned less salary, also known as "base pay", than certain other male salespersons, who had been hired after her. (Complainant's Exhibit 1; Tr. 75-78, 81-82, 200-03) These included both experienced salespersons, who were able to demand a higher initial salary rate, and Rocchio family members. Respondent paid its salespersons pursuant to the salary plan which was in effect at the time they were hired. These salary plans changed over time. (Complainant's Exhibit 8; Tr. 233-34, 324, 356-58)

19. The base pay, or salary, for experienced salespersons such as Complainant rose each year until it was capped at a rate set by John Rocchio. Complainant did not know whether her salary had been capped because she was a woman, or for some other reason. (Tr. 124, 136-137, 141-42)

20. Complainant stated in her verified complaint and testimony that, during her pregnancy, she was not been permitted to attend appointments with her doctor during office hours, and that Respondent's male employees were permitted to do so. (ALJ Exhibit 2; 75, 159-60, 162) Complainant supplied no proof for her belief that male employees were permitted to visit their doctors during the day, she admitted that other female employees were permitted to do so, and she did not know if her own activities were restricted because she was female. (Tr. 160-61, 164)

21. It is Respondent's policy to permit female employees six to eight weeks of maternity leave. (Tr. 251-53, 332)

22. I find that Complainant was permitted to attend appointments with her doctor during the day. (Tr. 232-33, 302) Complainant's base salary was not docked for these visits. (Respondent's Exhibit 4; Tr. 302, 309) John Rocchio did, however, reprimand Doug Tonucci for accompanying Complainant to her doctor appointment without recording same on the time clock at work. (Tr. 164-65, 302-03)

23. Due to their status as relatives of John Rocchio, Complainant and Doug Tonucci received free health benefits. (Tr. 34-35, 154)

24. Complainant alleged that during her pregnancy, Carol Rocchio constantly monitored her work activities by calling her and driving by her house to see if she was working. Complainant alleged that male salespersons were not subjected to this scrutiny. (ALJ Exhibit 2; Tr. 100-101, 168) However, Complainant produced no proof of differential treatment due to her status as a pregnant female, and admitted that she did not know if the reason Carol Rocchio took an interest in her activities was because of her status as a female or her pregnancy. (Tr. 168-69)

25. Carol Rocchio and Complainant enjoyed a close relationship before and during her pregnancy, and socialized by going out to lunch and other activities. (Tr. 156-57, 165-66, 166, 226-27, 257-64, 269, 275) I find that Respondent did not direct Carol Rocchio to monitor Complainant's activities for discriminatory reasons. (Tr. 262-64, 272, 309-10)

26. In June 2005, Doug Tonucci helped Complainant demonstrate a copier to potential customers at the State University of New York at Buffalo. (Tr. 13-14) Complainant stated in her verified complaint that as a result "(w)e were reprimanded for working together", and that male salespersons had worked together in the field and had not been reprimanded. (ALJ Exhibit 2) However, both Doug Tonucci and John Rocchio credibly denied that there had been any reprimand because of this incident. (Tr. 14, 169, 310-11, 339)

27. Complainant's last day of work for Respondent was July 5, 2005; she gave birth the next day. (Tr. 10,15, 101, 342) Prior to Complainant going out on maternity leave, John Rocchio stated to Complainant that she might not want to return to work once she had her baby. (Tr. 103, 174)

28. In her verified complaint, Complainant alleged that on or about July 18, 2005, John Rocchio had stated to Doug Tonucci that Complainant "should stay home and raise the child" and that it was Doug Tonucci's obligation to make money for the family. (ALJ Exhibit 2) In testimony at the public hearing, Complainant admitted that she had not been present for that conversation. (Tr. 170) John Rocchio credibly denied making that statement to Doug Tonucci. (Tr. 16, 311, 344)

29. I do not find that John Rocchio had planned to prevent Complainant from returning to work after her pregnancy. John Rocchio testified credibly that he had wanted her to return to work, as a top performing salesperson, and that he had not taken any actions to prevent her return. (Tr. 159, 301-02, 311-12, 319)

30. In late August or early September of 2005, Complainant called Hicks and advised him that she was ready to return to work on a part-time basis. Hicks advised her that he would discuss the matter with John Rocchio, and he did so. (Tr. 103, 175-76, 229, 239) John Rocchio replied that Respondent did not employ part-time salespersons, but suggested that Hicks speak to Complainant and request that she put her proposal in writing. (Tr. 173, 240, 241) Hicks did so, however Complainant never put her proposal in writing, nor did she communicate again with Hicks or John Rocchio regarding her job status. (Tr. 103-105, 176-77, 197-98, 230, 240-42, 243-47)

31. On December 1, 2005, John and Carol Rocchio went to Complainant's house. John Rocchio, believing that Doug Tonucci was in the house instead of out working, argued with Complainant. She then refused to allow him into the house. (Tr. 105-06, 318-19, 351-52). Following this incident, John Rocchio called Complainant and left a message on her answering machine that if she did not pick up the phone she was "done". (Tr. 106, 354-55) Doug Tonucci

then went to Respondent's offices, where he argued with John Rocchio and called Carol Rocchio a whore. (Tr. 45-46, 106, 199)

32. John Rocchio then called the police, who travelled to Complainant's house to confiscate a car, laptop computer and cell telephone which Rocchio claimed were company property. (Tr. 106-07, 355, 358)

33. Respondent terminated the employment of both Complainant and Doug Tonucci effective December 1, 2005. (Complainant's Exhibit 7; Tr. 23, 105, 109)

OPINION AND DECISION

The verified complaint did not set forth any allegation that Complainant received a lower base salary than Respondent's male salespersons. Pursuant to the rules of practice of the Division, I hereby amend the complaint to conform to the proof adduced at the public hearing. 9 NYCRR § 465.12 (f) (14).

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in terms, conditions or privileges of employment because of that person's gender. Human Rights Law § 296.1 (a)

Complainant's claim that she has suffered disparate treatment in the workplace may be shown through proof of either discriminatory employment action or that she has been subjected to a hostile work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.2d 295, 310, 786 N.Y.S.2d 382 (2004).

Discriminatory employment action

In order to establish her claim, complainant must first make out a prima facie case of discrimination. She must do this by showing that: (1) she was a member of a protected class; (2) she was capable of performing the duties of the job in a reasonable manner; (3) she suffered an

adverse employment action, and (4) this occurred under circumstances which would lead one to infer that she had been discriminated against. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 28-29 (1997).

In the instant case, it is clear that Complainant, as a pregnant female, was a member of a protected group, and that she was highly qualified to perform the duties of a salesperson for Respondent. However, Complainant failed to demonstrate in any substantive fashion that the transfer of her husband to the Amherst territory was a job action adverse to her own interests. The only adverse employment actions for which Complainant was able to demonstrate any substantive proof involved Complainant's lower base salary, the denial of gas bonuses to her, and her termination. With respect to the first two, Respondent amply demonstrated legitimate nondiscriminatory business reasons for its actions, which Complainant failed to rebut. With respect to the third adverse employment action, Complainant's termination, the proof adduced at the hearing clearly showed that this was the result of an unfortunate family dispute. There was no proof that Complainant was terminated because of her sex, or pregnancy. Much to the contrary, it appeared that Complainant was a favored and highly valued employee, and that Respondent offered to review her proposal to return to work. Complainant neglected to submit such a proposal, to her ultimate detriment.

Hostile Work Environment

A hostile work environment exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment". (internal citations omitted) *Father Belle Community Center v. New York State Division of Human Rights*, 221A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Department

1996), lv. denied, 89 809, 716 N. Y.S.2d 533 (1997). A complainant must subjectively view the conduct that creates a hostile environment as unwelcome. In addition, a reasonable person must subjectively view the conduct as severe and pervasive enough to create an abusive environment. *Father Belle Community Center v. New York State Division of Human Rights*, supra, at 51.

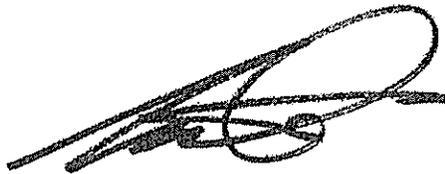
As set forth above, Complainant alleged a litany of discriminatory remarks and actions by Respondent. Even assuming that all of these took place, which was by no means proven, I find that Complainant was not subjected to conditions severe and pervasive enough to create an abusive environment. Complainant has failed to sustain her burden of proof. Therefore, 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 hereby is, dismissed.

DATED: February 27, 2009
Bronx, New York



Michael T. Groben
Administrative Law Judge